No. 11,802

United States Circuit Court of Appeals

For the Ninth Circuit

GILBERT E. THIEL,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF

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I.

PRELIMINARY STATEMENT[1]

A. NATURE OF PETITIONER'S ACTION.[2]

Appellant, a salesman,[3] his wife and a male companion, Johnny Morris, spent Sunday, February 18, 1940, to Sunday evening, February 25, 1940, in Reno, Nevada. During that week, but not after noon of Saturday, the 24th, appellant drank and gambled. He was sober at the time of the

1. Unidentified arabic numerals in parenthesis refer to the record. Figures before a colon indicate pages. Figures after colons indicate lines.

2. The facts and evidence are detailed below.

3. The complaint alleges appellant "was 28 years of age * * * and was employed as a salesman" (4).

accident of this action. About 8:40 p.m., Sunday, the 25th, his wife, Morris and he, boarded appellee's Train No. 9 at Reno, to go to San Francisco, California. They sat in the second day-coach. The train left Reno about 8:50 p.m.

After the train left Reno, while it was in motion, appellant, Morris and a fellow passenger, Rippetoe, left the second coach and went forward to the smoker, the first day-coach. In the smoker appellant and Morris sat together, appellant next to the window, Morris toward the aisle. Rippetoe took the seat just ahead. About 25 minutes out of Reno, the conductor came through the smoker, lifting tickets. Morris surrendered the tickets for his party. The conductor had passed on, a step or two, when appellant, without warning, suddenly opened the window and jumped out, so fast that it was impossible for Rippetoe, Morris and the conductor to stop him.[4] They tried. Appellant was hurt.[5]

Appellant had no connection with appellee except that of a passenger. There was no relationship of employer and employee. His action was one by a passenger against a carrier for damages for personal injuries claimed by the passenger to have resulted from negligence of the carrier. His complaint shows on its face that the immediate cause of his injury was his own voluntary act.[6]

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4. The complaint alleges that "while said train was in motion" appellant "suddenly opened the window of said train and leaping out" was injured (2, 3).

5. This happened in Nevada between Verdi and the California line, in the mountains of the Truckee River Canyon (see 1165).

6. The complaint, in an attempt to avoid this, alleges that appellant "was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors"; that he "was in a highly depressed mental state over his marriage a week before"; that "while out of his normal mind and in said highly de-

B. EARLIER PROCEEDINGS IN THE CASE.

This action was commenced in the California Superior Court for San Francisco, on December 30, 1940 (Complaint is at (1-4)). Appellee removed the action into the United States District Court for the Northern District of California, Southern Division,[7] and answered. It set up appropriate defenses by denial and affirmative statement[8] (6-11 and see 251-253).

An unsuccessful attack on the District Court's jurisdiction (see note 7) was followed by an attack on the jury panel which was overruled.[9] The case then went to trial before Judge Bowen, sitting in the Northern District of California, in November 1942 and resulted in a verdict

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pressed mental state" he "suddenly" opened the window and "leaping" out was injured (2, 3).

There is no further particularization; no claim he was completely out of his mind, wholly irresponsible, incapable of appreciating his surroundings, unable to comprehend the nature of his own acts or unable to care for himself.

7. Appellant twice moved to remand to the state court. His motions were denied. On appellee's petition attempts to proceed in the state court, in defiance of the orders of the District Court denying his motions, were enjoined. On appeal the decree was affirmed. (*Thiel v. Southern Pacific Company,* 126 F.2d 710 (C. C.A. 9, 1942) certiorari denied 316 U.S. 698, 86 L.ed. 1767.) This settled the jurisdiction of the court below.

The decision of this Court was followed by reckless and unsupported charges of unfairness, bias or fraud against everyone; of unfairness of this court; bias of the judge of the District Court; attacks on the Clerk and Jury Commissioner, the jury panel, the jurors selected to try the case, the judge who presided at the first trial, and, of course, appellee, its counsel and its witnesses. See appellee's brief on the first appeal after first trial of the merits, pages 5-8 (*Thiel v. So. Pac. Co.,* 149 F.2d 783, C.C.A. 9, No. 10,681) and record on that appeal.

8. The answer (6, 11) admitted appellant "had been" drinking (not that he was drunk), that he "suddenly opened the window" and leaped out and denied all charges of negligence. Other defenses set up appellant's own negligence, recklessness, wilful and wanton conduct, specifically setting up that his injuries were due to his own "independent, voluntary and wilful act." See Appellee's Brief, p. 4, on first appeal on the merits, C.C.A. 9, No. 10,681.

and judgment for the defendant (appellee).[9] Motions for judgment *n.o.v.* and for a new trial were denied.[9] On appeal to this Court the judgment was affirmed (No. 10,681; 149 F.2d 783). The Supreme Court granted certiorari "limited to the question whether petitioner's[10] motion to strike the jury panel was properly denied" (326 U.S. 716, 90 L.ed. 423) and on hearing of the petition reversed the judgment (328 U.S. 217, 90 L.ed. 1181).[11]

On the going-down of the mandate the case was again set down for trial upon the same pleadings[12] before the court and a jury from the July 1946 Term panel. A motion to strike the entire panel (30-34) was heard on August 19, 1946, testimony was taken, the matter was argued and submitted and the motion was denied[13] (147-237; 39 Opinion in Appendix C).

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9. The details of all this appear in the record in this court on the first appeal on the merits, No. 10,681 and see appellee's brief on that appeal, pages 6-9.

10. Plaintiff in the District Court, appellant in No. 10,681 and again appellant on this appeal.

11. The holding is dealt with in Part II below.

12. An attempt was made to amend the complaint but the defendant's (appellee's) objection was sustained (239-251; 63). No point is made of this ruling.

On the eve of the first trial, over objection, the complaint was amended by adding a third claim of negligence (par. VIIa). Defendant was not required to file a written answer but by the Court's order it was deemed that the amendment was "denied and answered." (No. 10,681, R. 140, 150-158; 13-27.) To avoid any question appellee, before the second trial, offered to file a written supplement to its answer (setting up, among other things, the statute of limitations which had been set up in its written objections to the amendment). The supplement was not filed on the statement of appellant's counsel that "I don't think it is necessary here. The record is clear", and his acquiescence in the understanding "that that amendment is adequately answered both negatively and affirmatively" (251-253).

13. This is all dealt with in Part II below. The court's opinion is reported in 67 F.Supp. 934, was filed August 28, 1946 and is set out at R. 39 et seq., and in Appendix C hereto.

The case went to trial before a jury[14] on September 10, 1946 (272) and ended on September 24, 1946 with a verdict for the defendant (appellee)(1028; 96) on which judgment was entered (97). Motions for judgment *n.o.v.* and for a new trial (99-115) were denied (116). This appeal followed.

The record on appeal was gotten up in a very irregular way. All matters do not appear in proper chronological order.[15] For this reason we append an index, enlarged beyond that in the record and containing a chronological schedule of all proceedings (App. A).

II.

APPELLANT'S POINT ABOUT THE JURY IS NOT WELL TAKEN

On June 6, 1946, the matter being regularly noticed on the Court's Calendar, published in The Recorder[16] (234:10-235:15) the jury panel for the July, 1946, Term was publicly drawn in open court before Judges Goodman and Roche.[17] The Court examined the Clerk (154-160) and

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14. The impanelment is covered in Part II below.

15. This is particularly true of certain testimony which was read from depositions or the record of the first trial. The record showing that it was read does not appear in its proper place and the testimony read appears at still a third place.

16. The calendars of the court below are regularly published Monday through Friday of each week in The Recorder, a paper of general circulation. On Judge Goodman's Calendar in The Recorder for Thursday morning, June 6, 1946, there appeared for 4 o'clock P.M. "In re selection of Master Jury Trial List—1946—July term of Court" (234:10-22). The statement of the attorney for the plaintiff that there was nothing in The Recorder (162:18) was in error.

17. The proceedings (154-162) were made part of the hearing on appellant's motion to strike the jury panel.

Jury Commissioner (160, 161) on how the names in the box had been selected, found that the names had been selected properly and ordered that 80 names be drawn for persons to be summoned as grand jurors and 300 names for persons to be summoned as trial jurors for the July, 1946, Term. This was done. (161:19-162:11)

Appellant, as his case approached trial, noticed a motion to strike the entire July, 1946, Term panel (30), the motion was heard August 19, 1946 (147-237), the proceedings of June 6, 1946, were made part of the record (154-162), testimony was taken and the motion was denied. (This is dealt with below in Part II-B.)

The case went to trial September 10, 1946, and on that day a jury, selected from the July, 1946, Term panel, was empaneled (272-279). With the constitutional 12, the Court selected an alternate juror (360-369).

A. APPELLANT WAIVED ANY CLAIM THAT THE JURY PANEL WAS NOT PROPERLY CONSTITUTED.

On the morning of the 6th day of trial, Wednesday, September 18, 1946, in chambers, the Court advised counsel for the parties that two jurors, Albert N. Wilmes and Miss Zola Taylor were unable to appear because of illness. In open court counsel agreed that they were satisfied that these jurors were ill. By stipulation the alternate juror, Mrs. Troupe (365), took Miss Taylor's place. The Court then stated that this made 11 jurors in the box and asked if counsel were willing to make a stipulation.[18] Counsel for appellant then stated:

"Yes, your Honor, plaintiff is willing to stipulate

18. The stipulation had been agreed upon at the conference in chambers (1209:21-25).

that the trial may proceed **with the 11 jurors** and the verdict of **the** 11 jurors may have the same full force and effect as if returned by 12 jurors''[19].

He added that the stipulation was entered into in the light of Rule 48.[20] Counsel for appellee joined in the stipulation and counsel for both parties announced that they were ready to proceed (725-728).

For the protection of the individual litigants various rules have been developed regulating the structure of courts (juries included) and judicial proceedings. Some have been thought sufficiently important to be guaranteed by the Constitution. Two are the right to trial by jury and to be represented by counsel. Yet even these rights, constitutional though they are, are so far personal to the individual that he can waive them. (*Adams v. U. S.*, 317 U.S. 269, 275, 87 L.ed. 268, 272;[21] *Hawk v. Olson,* 326 U.S.

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19. Counsel stipulated, of course, because he was completely satisfied with the jury he had and thought it would give him a verdict. He thought that for him it was a fair jury (see 1219:2-22). (Cf. *Carruthers v. Reed,* 102 F.2d 933, 938, col. 1 (C.C.A. 8, cert. den. 307 U.S. 643, 83 L.ed. 1523.) Having had his chance with it and lost he is not now entitled to say he did not think so ''because we were discussing the thing informally in chambers'' (1219:22).

20. ''The parties may stipulate that the jury shall consist of any number less than twelve * * *.''

21. The court said: ''This brings us to the merits. They are controlled in principle by *Patton v. United States,* 281 U.S. 276, 74 L.ed. 854, 50 S.Ct. 253, 70 A.L.R. 263 and *Johnson v. Zerbst,* 304 U.S. 458, 82 L.ed. 1461, 58 S.Ct. 1019. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. * * * The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article 3, Sec. 2, Para. 3; Sixth Amendment; Seventh Amendment. That

271, 279, 90 L.ed. 61, 67; *Wood v. Howard,* 157 F.2d 807 (C.C.A. 7,—cert. den. 331 U.S. 814, 91 L.ed. (Adv. Op.) 1075); *People v. Nakis,* 184 Cal. 105, 111, 193 P. 92.[22] Cf. *Breese v. U. S.,* 226 U.S. 1, 11, 57 L.ed. 97, 102.[23])

Within this rule claimed defects in the construction of a jury list or jury panel can be waived. Good grounds of challenge to the array (or for motion to strike or to quash the panel) can be waived and are, in fact, waived if the objection is not made in time or is not made in sufficiently precise form.[24] (*U. S. v. Gale,* 109 U.S. 65, 77, 27 L.ed. 857, 858;[25] *Agnew v. U. S.,* 165 U.S. 36, 41 L.ed. 624;[26] *Powers v. U. S.,* 223 U.S. 303, 312, 56 L.ed. 448, 452;[27] *Hyde v. U. S.,* 225 U.S. 347, 373, 56 L.ed. 1114, 1128;[28] *Turher v. U. S.,* 66 Fed. 280, 285 (C.C.A. 5);

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history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived 'in many cases, of the benefits of Trial by Jury.' But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.' ''

22. The sheriff, the officer designated to summon juries, was disqualified. The court, improperly, instead of designating the coroner designated an elisor who summoned the jury. Held, that the objection was waived.

23. The claim was that the grand jury was not present when the foreman presented an indictment.

24. The same rule applies to grounds of challenge to individual jurors. *Kohl v. Lehlbach,* 160 U.S. 293, 302, 40 L.ed. 432, 435; *Strang v. U. S.,* 45 F.2d 1006 (C.C.A. 5, cert. den. 283 U.S. 835, 75 L.ed. 1447) and 53 F.2d 820 (C.C.A. 5, denying writ of error coram nobis).

25. Objection was made that a statute excluding certain persons from the grand jury was unconstitutional.

26. Claimed that a special venire was improperly returned from part only of the District. Waiver was one of the grounds for rejecting the claim.

27. The claim was that the grand jury was not properly summoned and sworn.

28. The claim was that the jury commissioners improperly delegated their functions to a third person.

In *Francis v. Southern Pacific Company,* .... U.S. ...., 92 L.ed. (Adv. Op.) 610, 614, 68 Sup. Ct. Rep. 611, 614 the Court said:

> "Petitioners contend that the jury panel from which the jury in this case was selected was drawn contrary to *Thiel v. Southern P. Co.,* 328 U.S. 217, 90 L.ed. 1181, 66 S. Ct. 984, 166 A.L.R. 1412. We do not stop to inquire into the merits of the claim. The objection was made for the first time in the motion for a new trial. It seems to have been an afterthought, as the Thiel Case was decided a few weeks after the verdict of the jury in the present case. If not an afterthought, it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late. Cf. *Queenan v. Oklahoma,* 190 U.S. 548, 552, 47 L.ed. 1175, 1178, 23 S. Ct. 762."

In the *Queenan Case,* the claim was of disqualification of an individual juror for conviction of a felony. Proper objection was not made at the time of discovery of the fact. Held, that the defendant "could not speculate on the chances of getting a verdict and then set up that he had not waived his rights."

271, 279, 90 L.ed. 61, 67; *Wood v. Howard,* 157 F.2d 807 (C.C.A. 7,—cert. den. 331 U.S. 814, 91 L.ed. (Adv. Op.) 1075); *People v. Nakis,* 184 Cal. 105, 111, 193 P. 92.[22] Cf. *Breese v. U. S.,* 226 U.S. 1, 11, 57 L.ed. 97, 102.[23])

Within this rule claimed defects in the construction of a jury list or jury panel can be waived. Good grounds of challenge to the array (or for motion to strike or to

Haussener v. U. S., 4 F.2d 884, 887 (C.C.A. 8);[29] *McNichol v. U. S.*, 9 F.2d 623 (C.C.A. 6);[30] *U. S. v. Meyer*, 113 F.2d 387, 396 (C.C.A. 7,—cert. den. 311 U.S. 706, 85 L.ed. 459) and cases cited; *Johnson v. Williams*, 244 Ala. 395, 13 So. 2d 687; *People v. McCrea*, 303 Mich. 213, 6 N.W.2d 489, 514; *Johnson v. State*, 143 Tex. Cr. 54, 156 S.W.2d 986; *Gay v. City of Eugene*, 53 Or. 289, 100 Pac. 306.)

The rule of waiver has been applied to a claimed improper inclusion of women on a jury panel (*Zito v. U. S.*, 64 F.2d 772 (C.C.A. 7)),[31] to claimed improper exclusion of women (*Wuichet v. U. S.*, 8 F.2d 561, 562 (C.C.A. 6,—cert. den. 270 U.S. 561, 70 L.ed. 781) and see *Ballard v. U. S.*, 329 U.S. 187, 91 L.ed. (Adv. Op.) 195, 196[32]) and to claimed improper exclusion of a class because of race or color (*Bush v. Kentucky*, 107 U.S. 110, 27 L.ed. 354;[33] *Williams v. Mississippi*, 170 U.S. 213, 223, 42 L.ed. 1012, 1016;[34] *Franklin v. South Carolina*, 218 U.S. 161, 167, 54

29. The challenge was insufficient in form.

30. It was claimed the jurors were "repeaters" and did not come from the body of the district. Beyond this counsel declined to state in what respect the jurors were not properly selected. Held, that any point was waived because of insufficiency of statement of the grounds of challenge.

31. The claim was based on the circumstance that less than 30 days after sentence the Illinois statute providing for the inclusion of women was declared unconstitutional.

32. This case held that the point had not been waived but the court's discussion makes it clear that the objection that women were improperly excluded could be waived and would be waived by failure appropriately to make the point.

33. Held, that the motion to set aside the petit jury panel was properly overruled "for the reason, among others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African decent because of their race or color."

34. The Court took occasion to notice "that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused."

L.ed. 980, 984;[35] *U. S. v. Brady,* 47 F.Supp. 362,[36] aff'd 133 F.2d 476[37] (C.C.A. 4,—cert. den. 319 U.S. 746, 87 L.ed. 1702 reh. den. 319 U.S. 784, 87 L.ed. 1727); *Carruthers v. Reed,* 102 F.2d 933, 937 (C.C.A. 8,—c.d. 307 U.S. 643, 83 L. ed. 1523);[38] *State v. Wilson,* 204 La. 24, 14 So.2d 873, app. dis. 320 U.S. 714, 88 L.ed. 419; *Hicks v. State,* 143 Ark. 158, 220 S.W. 308 c.d. 254 U.S. 630, 65 L.ed. 447; *Washington v. State,* 95 Fla. 289, 116 So. 470 c.d. 278 U.S. 599, 72 L.ed. 528.[39] Cf. *Virginia v. Rives,* 100 U.S. 313, 25 L.ed. 667).

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35. "There was no allegation in the motion to quash upon this ground, or offer of proof to show that persons of the African race were excluded because of their race or color * * *." The court notices that it was "essential to aver" as well as prove the fact relied upon.

36. At page 367 the court notices the failure properly to present the point.

37. At page 480 and following the court speaks of the failure properly to present the point as a "waiver." It said that "the failure of experienced counsel, for reasons of their own, to offer the necessary proof to support the charge was as deliberate and effective a waiver as if the point had not been made at all. That a defendant, especially when represented by counsel, may make a competent and intelligent waiver of a constitutional right binding upon him is well established by repeated decisions." The point "of racial discrimination was raised so inadequately * * * that in effect it was not raised at all and was therefore waived."

38. After the trial it was claimed that negroes were systematically excluded from grand and petit juries. But the point was not raised because counsel feared to prejudice his case and because he thought he had a good jury. "Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they can not be permitted at a later time, after a decision has been rendered adverse to them, to obtain a retrial according to procedure which they voluntarily discarded and waived."

39. These three state cases were cases of claimed racial discrimination. Since a constitutional right was involved the procedure as well as the substance presented a federal question and whether the question was properly raised was a federal question. It was so held in *Carter v. Texas,* 177 U.S. 442, 447, 44 L.ed. 839, 841.

Where objection has been made to the jury and, thereafter, there is an agreement to proceed with the jury in the box, that stipulation effectively waives any objection to the jury. In *Bank of Grottoes v. Brown,* 8 F.2d 382 (C.C.A. 4) it was claimed that the Court improperly excluded from the jury all persons who were directors or stockholders in any bank or renters of safe deposit boxes. The Court held it was unnecessary to consider the point. After the jury retired it twice reported inability to agree. "Apparently, at that time, neither party wanted to be put to the expense and delay of a new trial and they mutually stipulated to accept a majority verdict. The Bank then knew who were on the jury and the agreement made was clearly a waiver of any objection to the way in which they were originally selected." In *Hoagland v. Chestnut Farms Dairy,* 72 F.2d 729 (C.A. for D.C.) a juror became sick. This left 10 men and an unmarried woman. On the suggestion that the testimony would be such as to cause her embarrassment the Court announced it would withdraw her and did so over the objection of plaintiff's counsel stating it would either discharge the remaining 10 jurors or proceed with the 10. Counsel for the parties then agreed to proceed with the 10. The Court said: "It is, of course, very clear that the appellant having consented to proceed with the remaining 10 male jurors cannot now complain."[40]

A party can not do what is attempted here. He can not

40. Compare the related question of consent to trial of a law issue on the equity side (*Williamson v. Chic, etc. Corporation,* 59 F.2d 918, 921 (C.C.A. 8); *Penley Bros. Co. v. Hall,* 84 F.2d 371, 373 (C.C.A. 1); *U. S. v. Havner,* 101 F.2d 161, 165 (C.C.A. 8)) and consent to try an equitable issue on the law side (*Mobile Ship Building Co. v. Federal Etc. Co.,* 280 Fed. 292 (C.C.A. 7, cert. den. 260 U.S. 726, 67 L.ed. 483).

agree to go forward with a jury in the box whose composition is known, take a chance that he will receive a favorable verdict and then raise the point that he was prejudiced by the composition of the jury if the result is against him. In the *Carruthers Case* the Court pointed this out in language quoted in note 38. Compare *Adams v. U. S.*, supra:

> "Simply because a result that was insistently invited, namely, a verdict by a Court without a jury, disappointed the hopes of the accused ought not to be sufficient for rejecting it."

In *Strang v. U. S.*, supra, 45 F.2d at 1007 the Court said:

> "Upon the showing made after verdict, the conclusion is inescapable that appellant was speculating on his chances of being acquitted, intending to rely on the disqualification of the juror only in the event he was convicted. He could not do this, but must be held to have waived the ground of challenge for cause based on the disqualification of the juror."

Compare, also, *Riley v. Davis,* 57 Cal. App. 477, 484, 207 P. 699 (hr. den.)[41] and *Fay v. New York,* 332 U.S. 1517, 91 L.ed. (Adv. Op.) 1517, 1528 bot. col. 2.[42]

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41. "Moreover, it is equally plain that if any disqualification existed it was waived by the failure of appellant to make timely objection. * * * He chose, however, to take his chances upon receiving a favorable verdict; and in such cases the just and well-established rule is, that, after the case goes against him, he cannot object to the validity of the verdict because of circumstances within his knowledge which he has declined to seasonably urge. * * * The authorities, indeed, seem to be uniform that a known cause of challenge is waived by holding it until after verdict, 'since such practice is incompatible with good faith and fair dealing which should characterize the administration of justice.'"

42. "It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught, on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case * * *."

B. THERE WAS NO MERIT IN THE MOTION.

The applicable statutes are set out in Appendix B. The grounds of the motion to strike the entire jury panel (30-34) which are still urged (App't's Br. 5, 31-42)[43] are:

1. The "vast majority" of those selected "are businessmen, business executives, wealthy persons, and those in the higher income brackets," that these "constitute an excessive percentage of all those eligible as jurors" and the percentage "is grossly disproportionate," a "small minority" are "working men and those of average income or less," they constitute any "insufficient percentage * * * and said percentage is grossly disproportionate" and this selection has been made purposely (Grounds 1 and 2).

2. "A larger proportion of men jurors has been purposely selected for said panel, thus discriminating against women" (Ground 3).

3. There was no Court order directing the parts of the district from which jurors should be returned and selec-

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43. Other grounds stated in the motion have not been argued and are abandoned. Ground 5 was that the Court had made no order to bring about compliance with the mandate of the Supreme Court and the matter of selection has been left to the discretion of the Jury Commissioner and the Clerk. The Statute commits this matter to their discretion. We deal with this matter below.

Ground 6 says that no substantial change has been made in the method of selection since the decision of the Supreme Court. The claim is unsubstantiated.

Ground 7 was that a large majority of those selected was connected with large business concerns having business with the defendant or social connections with officials of the defendant. This ground was not made out.

Ground 8 was that the Clerk and Jury Commissioner purposely endeavored to obtain jurors of superior intelligence basing selection solely on wealth and high income. This ground was not made out.

tion was not made on any basis of fair geographic distribution (Ground 4).

4. "No system of lot or chance was used in selecting jurors for said panel but each and every juror was personally selected by said jury commissioner or said clerk" (Ground 9).

The grounds were not that any class had been excluded but rather that it had not been included in proper proportions. Appellant's argument follows the same lines. It does not claim that any class was excluded but rather that the proportions of the classes (as Appellant elects to classify) do not correspond with the proportions for the same classes in this area as reflected by the United States census. In short, the grounds of motion and the argument are that a jury panel must be made of the various "classes" of eligible jurors in the same proportion that the classes are found in the community. The argument is that there should be proportional representation.

Attention first must be given to the decision on appeal from the first judgment (*Thiel v. Southern Pacific Company,* 328 U.S. 217, L.ed. 1181). The various claims now made (perhaps somewhat differently expressed, but in substance the same) were before the Supreme Court.[44]

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44. The questions were presented by notice of motion filed November 5, 1942 (R. No. 10,681, p. 9-11). The grounds (R. No. 10,681, pp. 10, 11), rearranged, were:

1. The judges of the District Court failed to prescribe any rules of qualification or otherwise for selection of jurors.

2. The judges of the District Court failed to provide necessary facilities or funds for proper investigation of prospective jurors.

3. The selection of jurors "is arbitrary because no examination whatever is made of said jurors before they are put on said **panel** to ascertain their qualifications or particularly their unfitness" by reason of connections with or prejudice in favor of "gigantic corporations" like respondent.

It particularly noticed the ground of want of proportional representation.[45] It did not sustain them but placed its decision, as Appellant's brief correctly states at p. 35, on "the sole ground" that there had been "exclusion of daily wage earners from the panel."[46]

The controlling considerations applied by the Court (said in *Ballard v. U. S.*, 329 U.S. 187, 91 L.ed. (Adv.

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4. No effort is made to apportion jurors "by districts."

5. By the acts of the clerk and jury commissioner "which may even appear fair on their face," defendant has prevailed in every personal injury action for the past nine years, and by reason of that fact it will be impossible for plaintiff to prevail and he will be denied trial by an impartial jury.

6. There has been class discrimination in "selecting" jurymen "on said panel" in this:

(a) A larger proportion of men is selected, thus discriminating against women.

(b) There is no effort to proportionately or fairly represent citizens of all races, thus systematically excluding Negroes and Chinese.

(c) Mostly business executives or those having the employer's viewpoint are selected, discriminating against other occupations and classes, particularly employees and poor people; plaintiff was regularly employed as a wage earner, and by consequence he is denied equal protection of the laws.

Plaintiff's own statement of the grounds appears at page 40 of the printed Petition for Certiorari and Brief in Support Thereof. The petition made and argued the points that (1) mostly business executives were selected and people of the working class were discriminated against (pp. 4-6, 16, 20, 39, 40), (2) more men than women were selected (pp. 4-6, 16, 20, 21, 40), (3) 28 U.S.C. §413 was not complied with and the names were not properly apportioned in the district (pp. 5, 16, 40, 45), and (4) the Clerk and Jury Commissioner personally picked the names—they did not result from any system of selection by chance (pp. 2, 39, 40).

45. At 328 U.S. 219 and 90 L.ed. 1184 the court quoted the stated ground that "mostly business executives or those having the employer's view-point are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes" etc.

46. Compare the dissenting opinion of Mr. Justice Frankfurter. In *Ballard v. United States*, 329 U.S. 187, 91 L.ed. (Adv. Op.) 195, the court stated as the controlling fact in the *Thiel Case* that "all persons who worked for a daily wage had been deliberately and intentionally excluded from the jury lists."

Op.) 195, 197 to be the gist of the ruling and this language was quoted) were stated as follows:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.* * * **This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community**; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

The Court states the facts to which these considerations were applied and its holding as follows:

> "Both the Clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who worked for a daily wage. * * * Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of $4 a day and would be excused for that reason. The exclusion of all those who earned a daily wage cannot be justified by Federal or state law."

The Court ignored the claims that the jury list was improper because "mostly business executives" etc. were selected and that there was not a sufficient portion of women,—it ignored the claim that there should be proportionate representation,—it ignored the claim that 28 U.S.C. §413 had been disregarded and that the names were not properly apportioned in the District, and it ignored the claim that the names were personally selected by the Clerk and jury commissioner (hand-picked) and were not selected by some scheme of chance. To the contrary on this last it expressly reaffirmed the rule that this was a matter for the discretion of those designated by statute as responsible for the list and said:

> "The choice of the means by which unlawful distinction and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers."

It is apparent from the decision in the *Thiel Case* and from the later decisions of *Ballard v. U. S.,* supra and *Fay v. New York,* 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517 that the court was not disturbing established and well-understood rules governing the preparation of jury panels and the determination of challenges to the array.

The established rules can be shortly stated:

The 7th Amendment guarantees to litigants in Federal courts "the basic institution of jury trials in only its most fundamental elements" (*Galloway v. United States,* 319 U.S. 372, 390, 87 L.ed. 1458, 1471, reh. den. 320 U.S. 214, 87 L.ed. 1851; *United States v. Wood,* 299 U.S. 123, 81 L.ed. 78, reh. den. 299 U.S. 624, 81 L.ed. 459), as those elements were developed at the common law (*Capital*

Traction Co. v. Hof, 174 U.S. 1, 43 L.ed. 873; *Thompson v. Utah,* 170 U.S. 343, 42 L.ed. 1061), with liberty to adjust details to make them congenial to the environment (*Galloway* and *Wood Cases; State v. Mercier,* 98 Vt. 368, 127 A. 715). The procedure developed was "not to enable the" party "to select jurors, but to secure an impartial jury." The Constitutional right was maintained, and a party had no cause of complaint, if his case was tried by a fair and impartial jury. (*Brown v. New Jersey,* 175 U.S. 172, 175, 44 L.ed. 119, 121; *Howard v. Kentucky,* 200 U.S. 164, 50 L.ed. 421; *Ex parte Spies,* 123 U.S. 131, 168, 31 L.ed. 80, 87; *Virginia v. Rives,* 100 U.S. 313, 25 L.ed. 667; *Fay v. New York,* 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517, 1532; *People v. Parman,* 14 C.2d 17, 92 P.2d 387.) He had such a jury if it was drawn from a list so selected that the list could be said to be fairly representative of the community[47] (*Glasser v. United States,* 315 U.S. 60, 86 L.ed., 680 reh. den. 315 U.S. 827, 86 L.ed. 1222 (1942); *Smith v. Texas,* 311 U.S. 128, 85 L.ed. 84 (1940)). It was representative of the community,[48] even if some classes

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47. Against bias or other disqualification of a particular juryman he was protected by challenge to the polls. *Aldridge v. United States,* 283 U.S. 308, 75 L.ed. 1054 (class prejudice is a proper matter for inquiry on the voir dire examination); *United States v. Wood,* 299 U.S. 123, 81 L.ed. 78, reh. den. 299 U.S. 624, 81 L.ed. 459; *State v. Brooks,* 57 Mont. 480, 188 P. 942 (prejudice against I.W.W.). See also, *Reynolds v. U. S.,* 98 U.S. 145, 25 L.ed. 244; *State v. Lloyd,* 138 Wash. 8, 244 P. 130; *Vega v. Evans,* 128 Ohio St. 535, 191 N.E. 757; *Sherman v. Ryan & Sons,* 126 Conn. 574, 13 A.2d 134; *State v. Lauth,* 46 Or. 342, 80 P. 660; *State v. Mercier,* supra.

48. And "community" must be understood to mean only those "citizens" of proper age who have their "natural faculties" and "ordinary intelligence." are "not decrepit," are "of **fair character** and **approved integrity,** and of **sound judgment,**" and have not been "convicted of malfeasance in office or any felony or other high crime." (Cal. C.C.P. §§198, 199, 205, App. B, pp. 14 et seq.)

were excluded, provided "the exclusion was not the result of race or class prejudice," the persons excluded were not such as "to make them act otherwise than those who were drawn would act" and "a sufficient number of unexceptional persons were present." (*Rawlins v. Georgia,* 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906); *People v. Prior,* 294 N.Y. 405, 63 N.E. 2d 8, 11 (1945).[49])

Our peculiarly American development (see note 49) came in criminal cases under the 14th Amendment and the Acts of 1875[50] (8 U.S.C. Sec. 44) and 1879 (Jud. Cod. Sec. 276, 28 U.S.C. Sec. 412). The result of the early

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49. Compare *People v. Arceo,* 32 Cal. 40, 45, quoting Mr. Justice Storey's opinion in *United States v. Cornell,* 9 Mason 91, Fed. Cas. No. 14,868; *Shettel v. United States,* 113 F.2d 34 (C.A. for Dist. Col., quoting the *Cornell Case* in note 11.

This goes beyond the common law. At common law, the array was not subject to challenge so long as the officer who prepared it (at common law the sheriff) stood indifferently as to the parties and issues. See 3 *Bl. Com.,* 359; 2 *Comyns, Digest,* 3 ed., 200 (Challenge, (B) Challenge to the Array); 19 *Halsbury's Laws of England,* 2 ed., 303 (Title Juries, par. 631); *Proffatt, Jury Trial* (1880), §§149 et seq.; *Thompson & Merriam, Juries* (1882), §126.

The total absence of discussion of the question in the case at bar in *Proffatt,* and the almost casual reference to the decisions of the Supreme Court of 1880 and 1881 in *Thompson & Merriam,* speak volumes.

50. Before 1875 there is no reference in any Federal statute (as to state statutes see App. B, p. 10, note 7), nor, so far as we are aware, is there any Federal decision (certainly none of the Supreme Court), touching on exclusion of general classes from jury service. The first statute expressly referring to jurors is the Act of March 1, 1875 (see App. B, p. 10, note 7), which applies to both state and Federal courts and deals only with classification on the basis of "race, color, or previous conditions of servitude." The first reference to party affiliation as a possible line that might be drawn in making arbitrary exclusions, is in the Act of June 30, 1879, c. 52, §2, 21 Stat. 43 (Jud. Cod., §276, 28 U.S.C.A., §412, App. B, p. 7). There are no decisions of the Supreme Court dealing with any claimed exclusion to which one or the other of these statutes did not apply except *Rawlins v. Georgia,* 201 U.S. 638, 50 L.ed. 899, until *Glasser v. United States,* 315 U.S. 60, 86 L.ed. 680 (1942).

cases[51] was summarized by the Supreme Court in 1896 in *Gibson v. Mississippi,* 162 U.S. 565, 40 L.ed. 1075.[52] Later cases have added little and have hardly varied the form of expression.[53] The rule can fairly be stated to be this:

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51. The main body of principles and rules dealing with claims of improper exclusion from jury lists was worked out in five cases decided from 1880 to 1883. *Strauder v. West Virginia,* 100 U.S. 303, 25 L.ed. 664; *Virginia v. Rives,* 100 U.S. 313, 25 L.ed. 667; *Ex Parte Virginia,* 100 U.S. 339, 25 L.ed. 676; *Neal v. Delaware,* 103 U.S. 370, 26 L.ed. 567; *Bush v. Kentucky,* 103 U.S. 110, 27 L.ed. 354. *Wood v. Brush,* 140 U.S. 278, 35 L.ed. 505 quotes and follows the *Neal Case* and is itself followed in *Jugiro v. Brush,* 140 U.S. 291, 35 L.ed. 510.

52. Followed in *Smith v. Mississippi,* 162 U.S. 592, 40 L.ed. 1082 and *Murray v. Louisiana,* 163 U.S. 101, 41 L.ed. 87.

53. *Carter v. Texas,* 177 U.S. 442, 44 L.ed. 839 stated the rule that equal protection of the laws was denied a colored defendant where "all persons of the African race were excluded, solely because of their race or color." Its statement was adopted by quotation in *Norris v. Alabama,* 294 U.S. 587, 79 L.ed. 1074, the court adding that "this statement was repeated in the same terms in *Rogers v. Alabama,* 192 U.S. 226, 231, 48 L.ed. 417, 419, 24 S.Ct. 257, and again in *Martin v. Texas,* 200 U.S. 316, 319, 50 L.ed. 497, 498, 26 S.Ct. 338." *Franklin v. South Carolina,* 218 U.S. 161, 167, 54 L.ed. 980, 985 said the proper rule was laid down in the *Carter* and *Rogers Cases* and the *Martin Case* was quoted and followed in *Thomas v. Texas,* 212 U.S. 278, 282, 53 L.ed. 512, 514 and these last two were cited and applied in *Ruthenberg v. United States,* 245 U.S. 480, 482, 62 L.ed. 414, 418. *Hale v. Kentucky,* 303 U.S. 613, 616, 82 L.ed. 1050, 1052 reversed because the proof showed "a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race and color." *Smith v. Texas,* 311 U.S. 128, 129, 85 L.ed. 84, 86 uses the expression "intentionally and systematically excluded from grand jury sercise solely on account of their race and color." *Glasser v. United States,* 315 U.S. 60, 86, 86 L.ed. 680, 707 reh. den. 315 U.S. 827, 86 L.ed. 1222, in a dictum, condemned "deliberate selection of jurors from the membership of particular private organizations." *Hill v. Texas,* 316 U.S. 400, 86 L.ed. 1559 speaks of the problem as one "of racial discrimination," and rests heavily on *Neal v. Delaware* and §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44). *Akins v. Texas,* 325 U.S. 398, 89 L.ed. 1692 uses the language "arbitrary and purposeful limitation," "purposeful discrimination," "deliberate and intentionally limited," and says that "a purpose to discriminate must be present."

A party entitled to a trial by jury is entitled to have the list from which the jurors will be drawn so prepared that class prejudice has not worked a **systematic, arbitrary and purposeful** discrimination against and exclusion of fellow members of a class determined by race, color, party affiliation, or other consideration irrelevant to the performance of a high duty of citizenship and such that the exclusion will, or might reasonably be expected to, reflect itself in the jury's determination, **solely because of membership in that class.**

The right is **not** of **inclusion** on the jury list of any particular person or class, or to a particular sort of jury. The right is only that there shall be no **systematic, purposeful, and arbitrary exclusion** of qualified and non-exempt persons **solely because of membership in a class** determined by prejudice and irrelevant considerations.

"A mixed jury, some of which shall be of the same race with the" party "cannot be demanded, as of right, in any case" (*Martin v. Texas,* 200 U.S. 316, 50 L.ed. 497). There is no right to have on the list or jury **any** member of the class to which the challenging party claims to belong. (*Virginia v. Rives,* note 51 above; *Neal v. Delaware,* note 51 above; *Bush v. Kentucky,* note 51 above; *Wood v. Brush,* 140 U.S. 278, 285, 35 L.ed. 505, 508; *Jugiro v. Brush,* 140 U.S. 291, 35 L.ed. 510; *Gibson v. Mississippi,* above; *Martin v. Texas,* above; *Thomas v. Texas,* 212 U.S. 278, 282, 53 L.ed. 512, 514; *Akins v. Texas,* 325 U.S. 398, 89 L.ed. 1692.[54])

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54. "Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. * * * Our directions that indictments be quashed when negroes, although numerous in the community, were excluded from grand jury lists have been based on

A fortiori a litigant cannot complain because there is no class representation on the jury list or jury in proportion to population. He is not entitled to a list made up of all classes, or specified classes, or any class in any given proportion.[55] (*Thiel v. So. Pac. Co.,* above; *Akins v. Texas,* supra;[56] *Virginia v. Rives,* above; *Thomas v. Texas,* above;[57] *Wong Yim v. United States,* 118 F.2d

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the theory that their continual exclusion indicated discrimination and **not the theory that racial groups must be recognized.** *Norris v. Alabama,* 294 U.S. 587, 79 L.ed. 1074; *Hill v. Texas,* 316 U.S. 400, 86 L.ed. 1559, and *Smith v. Texas,* 311 U.S. 128, 85 L.ed. 84, all supra. The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present * * *."

55. State cases to the same effect: *Jackson v. State,* 180 Md. 658, 26 A.2d 815, 816; *State v. Pierre,* 198 La. 619, 3 So. 2d 895, cert. den. 314 U.S. 676, 86 L.ed. 541; *Miera v. Territory,* 13 N.M. 192, 81 P. 586; *Davis v. Arthur,* 139 Ga. 74, 76 S.E. 675; *Washington v. State,* 95 Fla. 289, 116 So. 470, cert. den. 278 U.S. 599, 73 L.ed. 528.

56. See note 54. The Court also said: "Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia v. Rives,* 100 U.S. 313, 322, 323, 25 L.ed. 667, 670, 671; *Thomas v. Texas,* 212 U.S. 278, 282, 53 L.ed. 512, 513. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection."

The number of possible classes which might be, or be claimed to be, a class or classes of which a litigant imagines himself a member equally "stands in the way of evolution" of a concept that every such class is a candidate for discrimination. Compare note 59 below.

57. The Court said, by quotation: "It may be that the jury commissioner did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit juries in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated."

667 (C.C.A. 9,—cert. den. 313 U.S. 589, 85 L.ed. 1544);[58] *Beckett v. United States,* 84 F.2d 731 (C.C.A. 6).[59])

Indeed, absence of any given class from the jury list or jury is without significance. It has no tendency to show improper conduct. It does not show the "purpose to discriminate" that must be present (*Akins v. Texas,* above; *Fay v. New York,* 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517, 1530). It will not support an inference that the essential elements of valid complaint are present, i.e., systematic, purposeful, and arbitrary discrimination against members of a class solely because of membership in that class. (*Virginia v. Rives,* above; *Bush v. Kentucky,* above;[60] *Wood v. Brush,* 140 U.S. 278, 35 L.ed. 505; *Jugiro v. Brush,* 140 U.S. 291, 35 L.ed. 510; *Gibson v. Mississippi,*

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58. The rule is violated if "there is a systematic or arbitrary exclusion * * * of a particular race." But "the mere fact that the juries drawn from the lists represented only certain races, does not show that the list was made to include only two or three races or that it was in any manner discriminatory."

59. "The appellants wholly failed to produce any substantial evidence to establish a practice to systematic and arbitrary exclusion of negro citizens from the jury service. The proofs affirmatively show that a substantial number of colored citizens of the district were on the jury list. The fact that none were drawn for trial is, of course, not controlling. * * * We know of no statutory or constitutional mandate which requires proportional representation on jury lists of racial, religious, political or occupational groups within the district. Such requirement is not imperative to the drawing of a fair and impartial jury, would make impossible the functioning of the court and nullify the constitutional imperative that commands a speedy trial." Compare note 56 above.

60. "It might have been true that only white citizens were selected and summoned; yet it would not necessarily follow that the officers had violated the law and the special instructions given by the court 'to proceed in the selection without regard to race, color or previous condition of servitude.'"

above; *Thomas v. Texas,* note 57 above;[61] *Martin v. Texas,* above; *Franklin v. South Carolina,* 218 U.S. 161, 167, 54 L.ed. 980, 984; *Ruthenberg v. United States,* 245 U.S. 480, 62 L.ed. 414; *Akins v. Texas,* notes 54 and 56 above. See *Snowden v. Hughes,* 321 U.S. 1, 9, 88 L.ed. 497, 503.[62])

Lower Federal court and state cases are to the same effect.[63]

If members of the class to which the challenging party

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61. "It was ruled in *Martin v. Texas,* 200 U.S. 316, 50 L.ed. 497, as in other cases, that discrimination in organizing a grand jury and impanelling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries, * * *."

62. "But a discriminatory purpose is not presumed, *Tarrance v. Florida,* 188 U.S. 519, 520, 47 L.ed. 572, 573, 23 S.Ct. 402, there must be a showing of 'clear and intentional discrimination,' *Gundling v. Chicago,* 177 U.S. 183, 186, 44 L.ed. 725, 728, 20 S.Ct. 633; see *Ah Sin v. Wittman,* 198, U.S. 500, 507, 508, 49 L.ed. 1142, 1145, 1146, 25 S.Ct. 756; *Bailey v. Alabama,* 219 U.S. 219, 231, 55 L.ed. 191, 197, 31 S.Ct. 145. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face, *Neal v. Delaware,* 103 U.S. 370, 394, 397, 26 L.ed. 567, 573, 574; *Norris v. Alabama,* 294 U.S. 587, 589, 79 L.ed. 1074, 1076, 55 S.Ct. 579; *Pierre v. Louisiana,* 306 U.S. 354, 357, 83, L.ed. 757, 759, 59 S.Ct. 536; *Smith v. Texas,* 311 U.S. 128, 130, 131, 85 L.ed. 84, 86, 87, 61 S.Ct. 164; *Hill v. Texas,* 316 U.S. 400, 404, 86 L.ed. 1559, 1562, 62 S.Ct. 1159. But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Virginia v. Rives,* 100 U.S. 313, 322, 323, 25 L.ed. 667, 670, 671; *Martin v. Texas,* 200 U.S. 316, 320, 321, 50 L.ed. 497-499, 26 S.Ct. 338; *Thomas v. Texas,* 212 U.S. 278, 282, 53 L.ed. 512, 514, 29 S.Ct. 393; cf. *Williams v. Mississippi,* 170 U.S. 213, 225, 42 L.ed. 1012, 1016, 18 S.Ct. 583."

63. *Wong Yim v. United States,* note 58 above; *Beckett v. United States,* note 59 above; *Young v. United States,* 242 F. 788 (C.C.A. 4,—cert. den. 245 U.S. 656, 62 L.ed. 533); *State v. Brownfield,* 60 S.C. 509, 38 S.E. 2, aff'd *Brownfield v. South Carolina,* 189 U.S. 426, 47 L.ed. 822; *State v. Ryan,* 141 Kan. 549, 42 P.2d 591, 592, col. 1; *Merriweather v. Commonwealth,* 118 Ky. 870, 82 S.W. 592; *State v. Logan,* 344 Mo. 351, 126 S.W.2d 256.

claims to belong, and which it is claimed was improperly excluded, actually appear on the jury list or jury, this answers the claim of systematic, purposeful and discriminatory exclusion (*Fay v. New York,* above; *Akins v. Texas,* above; *Murray v. Louisiana,* 163 U.S. 101, 41 L.ed. 87; *Thomas v. Texas,* 212 U.S. 278, 53 L.ed. 512; *Beckett v. United States,* note 59 above; *People v. Prior,* above; *Miera v. Territory,* 13 N.M. 192, 81 P. 586).

Jury lists do not produce themselves. Someone must prepare them. Under the Federal statutes, this is a non-delegable duty of the clerk (or his deputy)[64] and the jury commissioner (Jud. Cod. §278, 28 U.S.C.A. §412 and see App. B, pp. 7, 8, note 4). It calls for the exercise of judgment.[65] To perform their duty they necessarily have committed to them a discretion in making selection of names from which to draw (*Glasser v. United States,* 315 U.S. 60, 85, 86 L.ed. 680, 707;[66] *Williams v. Mississippi,* 170

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64. Before the 1917 amendment even a deputy clerk could not act. *Dunn v. U. S.,* 238 F. 506 (C.C.A. 5).

65. They must select "citizens" of proper age, possessed of "natural faculties and of ordinary intelligence and not decrepit," who have a "sufficient knowledge of the English language," (Cal. C.C.P. §198). They must avoid persons "convicted of malfeasance in office or any felony or other high crime" (Cal. C.C.P. 199), take only those "of fair character, and approved integrity, and of sound judgment" (Cal. C.C.P. §205), and should avoid persons having any of the numerous California exemptions (Cal. C.C.P. §200).

66. "Jurors in a federal court are to have the qualifications of those in the highest court in the state, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code §§275, 276, 28 U.S.C.A. §§411, 412. This duty of selection may not be delegated. And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called."

U.S. 213, 42 L.ed. 1012; *Franklin v. South Carolina,* 218 U.S. 161, 168, 54 L.ed. 980, 985;[67] *Akins v. Texas,* supra;[68] *Walker v. United States,* 93 F.2d 383, 391 (C.C.A. 8,—cert. den. 303 U.S. 644, 82 L.ed. 1103, reh. den. 303 U.S. 668, 82 L.ed. 1124);[69] *Wilson v. United States,* 104 F.2d 81 (C.C.A. 5,—cert. den. 308 U.S. 574, 84 L.ed. 481); *Collins v. State,* 234 Ala. 197, 174 So. 296; *Thomas v.*

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67. The statute gave "to the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. * * * The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications."

68. Names for the jury list were selected by the commissioners. "This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this court."

69. The clerk and commissioner, seeking information, sent out a circular letter saying that the desire was "to obtain for jury service the best men in the community, men of intelligence, unquestioned integrity, and who represent the best interests of the community. We do not want men for this service simply because they have nothing else to do * * *. We want men of business affairs." There was a claim of improper exclusion of "the wage-earning class and unemployed persons and all persons not 'men of business affairs.'" The Court held the challenge was properly overruled and said: "We think the contention is entirely without merit. This court has held that the exclusion of a certain part of a district is proper and that the court need not give any reason, and certainly there is a presumption that it has exercised a sound discretion in making the order and the burden is on the party who seeks to challenge it as arbitrary." It was further held that the clerk and the commissioner had not delegated their function; that "the law does not contemplate that they must acquire personal knowledge of or acquaintance with prospective jurors so that they may act on their personal knowledge. The manner of acquiring information is for them to determine. * * * These officers, having discharged their duty in a manner not tainted by any suggestion of evil purpose or fraud, are not subject to criticism."

Texas, supra).[70] This completely disposes of appellant's suggestion that selection of names should be left to some scheme of chance.[71]

Whether the Clerk and Jury Commissioner acted honestly and properly exercised their discretion necessarily presents "a question of fact" (*Thomas v. Texas,* 212 U.S. 278, 282, 53 L.ed. 512, 514). This issue of fact is to be determined by the court of original jurisdiction,—the court for which the jury list is prepared. "All challenges, whether to the array or panel or to individual jurors for cause or favor, shall be tried by the court without the aid of triers" (Jud. Cod. §287, 28 U.S.C.A. §424, App. B, p. 13). The trial court is competent to determine the fact (*Wood v. Brush,* 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891), followed in *Jugiro v. Brush,* 140 U.S. 291, 35 L.ed. 510; *Andrews v. Swartz,* 156 U.S. 272, 39 L.ed. 422 (1895); *Gibson v. Mississippi,* 162 U.S. 565, 584, 40 L.ed. 1075, 1079 (1896); *Pierre v. Louisiana,* 306 U.S. 354, 83 L.ed. 757 (1939); *Akins v. Texas,* below). Its determination is entitled to the same respect as the determination of any other question of fact committed to it. If it finds the fact (a general finding by denial of the challenge is sufficient,—*Akins v. Texas,* below), and that there has been no abuse of discretion by the clerk and the jury commissioner, its finding must be affirmed, if there is any evidence to sup-

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70. The Court quoted from the opinion of the court below to the effect that want of full *pro rata* representation would not be evidence of discrimination and that there was no violation of the Constitution if the jury commissioners "fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in their selection of the jury lists."

71. And the Supreme Court ignored the claim on the earlier appeal in this case. See pp. 14 et seq. above.

port it (*Thomas v. Texas,* above;[72] *Akins v. Texas,* 325 U.S. 398, 89 L.ed. 1692;[73] cf. *Reynolds v. U. S.,* 98 U.S. 145, 156, 25 L.ed. 244, 247; *Ex parte Spies,* 123 U.S. 131, 179, 31 L.ed. 80, 90; *Green v. U. S.,* 19 F.2d 850 (C.C.A. 9);[74] *Robinson v. U. S.,* 144 F.2d 392, 398 (C.C.A. 6);[74]

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72. "The only contention was that the Jury Commissioners, in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error, did in fact exclude therefrom negroes or persons of African descent because of their race and color. This was a question of fact; and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to state courts. * * * As before remarked whether such discrimination was practiced in this case, was a question of fact and the determination of this question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution which cannot be presumed, and which there is no reason to hold on the record before us."

73. "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, *Norris v. Alabama,* 294 U.S. 587, 589, 590, 79 L.ed. 1074, 1076, 1077, 55 S.Ct. 579; *Smith v. Texas,* 311 U.S. 128, 130, 85 L.ed. 84, 86, 61 S.Ct. 164, we accord in that examination great respect to the conclusions of the state judiciary. *Pierre v. Louisiana,* 306 U.S. 354, 358, 83 L.ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process' (citing cases)."

74. These three cases were affirmed on certiorari limited to another question.

American Tobacco Co. v. U. S., 147 F.2d 93, 118 (C.C.A. 6)[74].[75]

Here the appellant has the burden of showing error—want of any evidentiary support for the determination of the trial court. In the trial court, appellant had the burden of proof of his claim by competent evidence. There are no presumptions to assist him. To the contrary the presumptions are the other way (*Fay v. New York*, 332 U.S. 216, 91 L.ed. (Adv. Op.) 1517, 1530;[76] *Akins v. Texas*, above;[77] *Glasser v. U. S.*, 315 U.S. 60, 87, 86 L.ed. 680, 708;[78] *Lewis v. U. S.*, 279 U.S. 63, 73 L.ed. 615, 619;[79]

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75. The rule in the state courts is the same. *Herndon v. State* 178 Ga. 832, 174 S.E. 597, 601, app. dis. 295 U.S. 441, 79 L.ed. 1530; *State v. Walls*, 211 N.C. 487, 191 S.E. 232, 237, app. dis. and cert. den. 302 U.S. 635, 826 L.ed. 494; *State v. Henderson*, 216 N.C. 99, 3 S.E.2d 357, 361; *Lugo v. State*, 136 Tex. Crim. App. 226, 124 S.W.2d 344; *Hamilton v. State*, 138 Tex. Crim. App. 205, 135 S.W.2d 476, second appeal 141 Tex. Crim. App. 614, 150 S.W.2d 395, cert. den. 314 U.S. 609, 86 L.ed. 490.

76. Mere showing of absence of a class is not enough; "there must be a **clear showing** that its absence was caused by discrimination" and "the burden of proving it purposeful and intentional is on the defendant" [challenger].

77. "The burden is, of course, upon the defendant to establish the discrimination. *Tarrance v. Florida*, 188 U.S. 519, 520, 47 L.ed. 572, 573, 23 S.Ct. 402; *Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497, 26 S.Ct. 338; *Norris v. Alabama*, 294 U.S. 587, 590, 79 L.ed. 1074, 1077, 55 S.Ct. 579. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice."

78. Referring to a stipulation that an affidavit might be accepted as proof: "In the absence of such a stipulation, it is incumbent on the moving party to introduce or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough. *Smith v. Mississippi*, 162 U.S. 592, 40 L.ed. 1082; *Tarrance v. Florida*, 188 U.S. 519, 47 L.ed. 572; cf. *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 882. * * * The failure of petitioners to prove their contention is fatal."

79. Said that if "the contrary is not expressly shown," com-

Neal v. Delaware, above; *Bush v. Kentucky,* above; *Snowden v. Hughes,* above; *Tarrance v. Florida,* 188 U.S. 519, 520, 47 L.ed. 572, 573; *Brownfield v. So. Carolina,* 189 U.S. 426, 47 L.ed. 882; *Martin v. Texas,* above; *Thomas v. Texas,* above; *Franklin v. So. Carolina,* above).[80] The claim must be supported by evidence *ore tenus.* As the *Glasser Case* points out (note 78) in the absence of a stipulation that it might be used, and there was none, the affidavit of appellant's counsel, even had it been offered and received in evidence, and it was not, is of no weight.[81]

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pliance with the Federal statutes dealing with preparation of jury lists "may be taken as sufficiently established by the presumption of regularity. It is the settled rule that all necessary prerequisites to the validity of official action are presumed to be complied with and that where the contrary is asserted it must be affirmatively shown."

80. The holdings of the lower Federal Courts and State Courts are to the same effect. *Mamaux v. United States,* 264 F. 816, 819 (C.C.A. 6); *Wolf v. United States,* 292 F. 673, 678 (C.C.A. 6); *Hindman v. United States,* 292 F. 679, 682 (C.C.A. 6); *Carroll v. United States,* 16 F.2d 951, 955 (C.C.A. 2,—cert. den. 273 U.S. 763, 71 L.ed. 880); *Needham v. United States,* 73 F.2d 1, 2 (C.C.A. 7,—cert. den. 294 U.S. 705, 79 L.ed. 1241); *Walker v. United States,* note 69 above; *United States v. Brady,* 47 F.Supp. 362, 368, aff'd 133 F.2d 476, 480 (C.C.A. 4,—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *State v. Brownfield,* 60 S.C. 509, 39 S.E. 2, aff'd 189 U.S. 426, 47 L.ed. 882; *Haynes v. State,* 71 Fla. 585, 72 So. 180, 182; *State v. Dallao,* 187 La. 392, 175 So. 4, app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601; *State v. Pierre,* 198 La. 619, 3 So.2d 895, cert. den. 314 U.S. 676, 86 L.ed. 541; *Davis v. Arthur,* 139 Ga. 74, 76 S.E. 675.

81. Accord: *Smith v. Mississippi,* 162 U.S. 592, 600, 40 L.ed. 1082, 1085; *Carter v. Texas,* 177 U.S. 442, 447, 44 L.ed. 839, 891; *Tarrance v. Florida,* 188 U.S. 519, 47 L.ed. 572; *Brownfield v. South Carolina,* 189 U.S. 426, 47 L.ed. 882; *Martin v. Texas,* 200 U.S. 316, 50 L.ed. 497 (1906); *Franklin v. South Carolina,* 218 U.S. 161, 167, 54 L.ed. 980, 985; *Mamaux v. United States,* 264 Fed. 816, 819 (C.C.A. 6; *United States v. Brady,* 47 F.Supp. 362, aff'd 133 F.2d 476 (C.C.A. 4,—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *Franklin v. State,* 85 Ark. 534, 109 S.W. 298; *Montjoy v. Commonwealth,* 262 Ky. 426, 90 S.W.2d 362.

Taking appellant's brief on its face it is answered by what has been said. The real argument, that proportionate representation is required, is answered at page 21 et seq. above, and by the decision in this case, page 14 et seq. above (cf. opinion of this court on earlier appeal). The brief insists that there must be affirmative inclusion of classes with proportionate representation. It overlooks that the rule is only one against purposeful and discriminatory exclusion of classes.

But appellant's brief cannot be taken at its face. It argues (pp. 31, 32, 34) that there was an arbitrary selection of 50% from the class of executives or managers of firms or presidents or owners of business; that the intention was to get an even balance between capital and labor which does not exist in the general population. The argument is based on a misrepresentation of the record. It disregarded the rule that with a finding of fact the only question is whether there is evidence to support it (see p. 27 above). It does not deal with the whole record fairly. It selects only those portions felt to be favorable, and mutilates the record by disregard of evidence that refers directly to evidence dealt with.

In the first place attempt is made to use an affidavit (App. Br. p. 6). Affidavits cannot be used to support a motion or challenge of the sort made (p. 30 above). Beyond this the record shows that the affidavit was not before the court. It was never offered in evidence (cf. *Meade v. Reynolds,* 120 Cal. 234, 52 P.491). At the only point where reference was made to it appropriate grounds of objection were stated and sustained (167:21; 169:13).[82]

82. The objection included the point that under the *Glasser* and other cases the affidavit could not be used and the added ob-

The only other showing was the testimony of Mr. Calbreath, the Clerk, and Mr. Mikulich, the Jury Commissioner.[83] This evidence showed:

The areas from which names were selected was enlarged in 1940 to include the general commuting area tributary to San Francisco and again in 1943 when Mr. Calbreath became Clerk (C. 219:17 et seq.; 223:17; M. 200:20). It included the counties of San Francisco, San Mateo, Alameda and Marin. The Commissioner took a few names from southern Contra Costa. About 50% of the names were from San Francisco, some 20% to 25% from Alameda, and the remainder from the other counties. Within each area the attempt made was to get a geographical cross-section and to take an appropriate proportion of the names from each part. Lists of registered voters, city directories for San Francisco and Oakland, and phone directories were used; about 50% of the names came from the lists of voters, a small part from telephone

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jections that the affidavit was hearsay, conclusions and irrelevancies (169:19).

Even where proof can be made by affidavit, the affidavit must meet the same tests of admissibility as evidence *ore tenus* (*Willis v. Lauridson,* 161 Cal. 106, 108, 118 Pac. 530; *Bull v. International Power Co.,* 87 N.J.Eq. 1, 99 A. 111, 114). Mere conclusions and generalities, without statement of evidentiary fact, are insufficient for any purpose (*Willis v. Lauridson,* supra; *Bull v. International Power Co.,* supra; *Mason v. San-Val etc. Co.,* 1 C.2d 666, 672, 36 P.2d 620; *A. G. Col. Co. v. Superior Court,* 196 Cal. 604, 615, 238 Pac. 926; *Schwartz v. Arata,* 45 C.A. 596, 606, 188 Pac. 313). Hearsay statements are without probative effect when met with objection on that ground (*Bull v. International Power Co.,* supra; *A. G. Col. Co. v. Superior Court,* supra; *Pandolfo v. United States,* 286 Fed. 8, 20 (C.C.A. 7,—cert. den. 261 U.S. 621, 67 L.ed. 831); *In re Roth,* 3 C.A.2d 226, 233, 235, 39 P.2d 490; *Union etc. Bank v. Kolpenitsky,* 125 N.J.Eq. 125, 4 A.2d 413, 415).

83. In referring to this evidence a "C" preceding the record reference refers to the Clerk's testimony and an "M" to the Commissioners.

directories and the remainder from city directories (C. 155:15-159:10; 214:18; 220:18; M. 160:21-161:18; 164:17-19; 166:4 et seq.; 184:7; 191:2; 195:1; 200:15; 204:1). The names were taken at random, from the top of one list, from the end of the next, from the middle of the third, etc. (C. 156:21; 159:16; 215:3; 224:23; M. 160:21-161:18; 194:17-195:6).

Using their best judgment the attempt was made to get a fair cross-section of this whole community within commuting distance of the court (M. 184:1 et seq.; 191:2; C. 216:22; 218:14; 219:6; 224:19). No class was excluded for any reason whether the class was one defined by race, color, creed, occupation, economic status or otherwise. In this respect a change had been made and included were those working for an hourly or daily wage. The only exclusions were those of people disqualified or exempt as provided in the California statute.[84] No class was excluded. (C. 157:24; 220:3 et seq.; 221:4; M. 201:2-202:15; 170; 221) Indeed, in many instances the business connection of a person whose name was selected was not known. The salary, financial and economic status of the persons selected were not known. No attention was paid to occupation unless it showed exemption or disqualification[84] and except that if one class, e.g., insurance people, was too heavily represented, an adjustment was made so the list would fairly represent all classes (C. 156:25 et seq.; 215:16 et seq.; 218:22; 220:13 et seq.; M. 165:10; 184:20; 193:18; 201:5). There was no attempt to get people of higher intelligence or other than ordinary intelligence and there was no information on this except as occupation showed it (M. 191:21, C. 214:3).

84. Statutes set out in Appendix B, pp. 14 et seq.

The argument advanced is grounded on a twisting of the testimony of the Clerk on the hearing of June 6, 1946, and a misrepresentation of the testimony of the Jury Commissioner.

On June 6, 1946, Mr. Calbreath testified (158) that he tried to select approximately half of the proposed jurors from the working class, making no distinction between those who worked for a daily wage and those who worked for a weekly or monthly wage. It is asserted that the other 50% was made up "of the executives or managers of firms or presidents or owners of business" (see App. Br., p. 31) but this was not his testimony. His testimony was:

> "The other 50% that made up the list were made up of some of the executives or managers of firms or presidents or owners of business; the colored population was taken into consideration; we put some 15 to 20 colored people in the jury box and also put the same number of Chinese into the jury box." (158:8)

In other words 50% were from the working class and the other 50% were from all other classes:

> "Q. So that fifty percent in that classification of truck drivers, carpenters, plumbers, longshoremen, people of that general classification that we call working people and their wives made up about half the list?
>
> A. That is correct.
>
> Q. **And the other half was made up of everybody else?**
>
> A. **Yes.**
>
> Q. Was that other half restricted to high-salaried executives of corporations?

A. Well, I don't know what a high-salaried executive of a corporation is, but I do put in some vice-presidents of banks. I put them in there—tellers of banks, general managers of plants, owners of small businesses. For instance, I put a tailor, a man who owns a tailoring business, I put him in that class.

Q. And a cleaner and dyer?

A. If he owns a business, I put him in that class.

Q. Neighborhood grocery store?

A. Yes.

Q. Or a meat or grocery concessionaire in a large market?

A. Yes.

Q. You put them in that classification?

A. Yes." (222:19-223:12)

He did not try to get a group of a particular class or discriminate by excluding any particular class, or by overloading or including any particular class and in this sense endeavored to equalize; if he found he was overweighed by department store clerks or insurance people he balanced by taking carpenters or butchers or other people of that class (221:2).

The Jury Commissioner was asked what percentage of businessmen, executives, managers and owners of business he selected and replied by asking what was meant by executives (167:1-168:24). The term was not thereafter used. He then said that he endeavored to divide between "people who were working for a wage, daily or by the month, laboring people, business people * * * about half the names of **business people** in and the other half those that are working for wages"; trying to get a balance; "50% of employers, businessmen, **and so forth**, as against

50% of people earning wages, daily or weekly'' (171:5-172:4; 174:21). He made it clear that by ''business people'' he did **not** mean owners, officers of corporations or principal executives of large business concerns. He testified that on the list as a whole there had been an increase of laboring people (188:2), that from 25 to 30% represented manual laborers (174:25-175:8; 183:15) and that by business people he did **not** mean managers and executives; that there were very few executives (205:25); that there were not 50% of managers and executives (207:9; 208:5); **that among business people he included all people who were connected with business**; that business people would include people operating small businesses of their own, such as a storekeeper, a market keeper, a butcher having a concession, department managers, buyers and people of that class, employees of business houses as salesmen and accountants; that he did not intend the expression to mean officers of corporations or executives (203:7-25); that a young lady who was a clerk would be a business person and he would include clerks, stenographers, solicitors, and salesmen (205-206:21):

> ''Q. I present again that the record is indefinite. Counsel said in the other fifty per cent you put in —and we have been talking here about a fifty per cent and I don't know whether that is this fifty per cent or not, but fifty per cent or half of the people on your list are managers and presidents and officers of corporations, and business people of that type?
>
> A. **No, they are not.**
>
> Q. So, you are talking about business people and you mean people connected with what you would call a business house, an insurance concern or a stationery

or a department store, whatever their occupation or position might be there?

A. Yes, that is my interpretation of business.
Q. That may include some department heads?
A. Yes.
Q. But it would also include a salesgirl?
A. Yes.
Q. Or a stockroom clerk?
A. Yes.
Q. Or salesman or solicitor, people of that type?
A. Yes." (208:5—208:21)

"I am telling you my idea of business people are people that are connected with business. I wouldn't call a hod carrier a business man, but I think a clerk, a salesman, a man connected with a business, any type of business, are business people." (209:7-11)

The case makes apparent the insuperable difficulty of attempting to get classifications for a jury list. This was pointed out in *Fay v. New York,* supra. So long as we are dealing with only two mutually exclusive classes as the black and the white races, there is little difficulty. But there is no agreement on social and economical classification, and the classes are not mutually exclusive. The hired man of a corporation working on a salary may be wealthy, prominent and of enviable social position or he may be just the reverse. The proprietor and chief executive of a business, whether it is large or small may be rich or poor and whether one or the other may be respected or in ill-repute. The owner of a small business (on this jury there was a sign painter who had his own business) socially and economically may be of the same class as a journeyman plumber working for an hourly or a daily wage. A

butcher may be a member of the Armour family, a department head of Swift & Co., the proprietor of the meat concession in the Rex Market on Polk Street or a clerk behind the counter at a Safeway Store. Ministers and teachers are traditionally poor. Gamblers, if we can believe the daily papers and the difficulties of the telephone company, are rich. Negroes and women appear all along the social and economic scale. This need not be enlarged upon. We respectfully refer the Court to Mr. Justice Jackson's opinion in the *Fay Case.*

The problem presented by the inclusion of women is a specific instance of the difficulty. The Clerk indicated he endeavored to select 50% women,—from 40% to 50% (157:14; 211:21). The Jury Commissioner endeavored to get 40% (188:12; 189:1; 190:1; 195:16). The actual percentage of the panel as finally sworn was slightly lower. It is to be compared with 7000 out of 60,000 on the general panel in the *Fay Case* and 30 out of approximately 2911 on the special panel where, in Note 4, citing the *Akins Case,* it was said it was almost frivolous to argue that any bias against women was shown. The opinion (91 L.ed. (Adv. Op.) at 1532) points out that the considerations affecting the inclusion of women are historical as well as logical. A few of the practical considerations are that it is more difficult to determine the occupation and economic status of a woman or of her husband (if not working she is listed merely as housewife) and so to get a proper balance in other classifications. Women whose names are drawn from the box are less likely to present individual claims of exemption or excuses on the ground of hardship. There is a real likelihood that if the names

put into the box are 60% men and 40% women, the panel finally selected may well be 50% of each. But the point need not be over-worked. There is no requirement of proportional representation of women (see p. 22 above). The point was made when this case was before the Supreme Court of the United States and was there ruled against appellant *sub silencio* (see p. 14 above). And see the earlier opinion of this court, 149 F.2d 783.

There is nothing to the point that the names were selected by the Clerk and the Jury Commissioner at random from lists of voters and directories. There is no requirement that the names be selected by some scheme of chance or according to some mathematical formula. Indeed, this would be a violation of the statute.[85] The statute commits the matter to the discretion of the Clerk and the Jury Commissioner (see p. 25). This point was made when this case was before the Supreme Court of the United States and was given silent treatment.

There is nothing to the point that there was no order directing the parts of the district from which the jurors should come. The statute contemplates that they may not come from the whole district and it is no objection because they do not (App. B, p. 9). The practice followed here was one that had been followed consistently. Indeed, it was the practice for 30 years under Mr. Calbreath's predecessor as Clerk and under Mr. Mikulich (see Appellee's Brief in C.C.A. 9 No. 10681 where references are given to the testimony of Mr. Maling and Mr. Mikulich). It was a practice adopted on the instruction of the Court, and certainly received tacit approval of the District Court.

85. 28 U.S.C. § 412. See Appendix B, p. 7.

But there is something more important. Before the names for this panel were drawn two judges of the District Court, Judges Goodman and Roche, on June 6, 1946, had an open hearing and inquired, among other things, of the parts of the district from which the names had been selected. With that information the Court then made a finding that the names "have been properly selected," and made a formal order for drawing the names. If a formal order was required it was made (161:19). (Cf. *Lewis v. U. S.*, 279 U.S. 63, 73 L.ed. 615.)

Nothing else needs be considered. The burden was on the challenger to make and sustain claims of irregularity. All gaps are filled by the presumption of regularity in the conduct of the Clerk and the Jury Commissioner.[86] There is nothing to meet or overcome this presumption even where testimony was introduced.

Some reference has been made to the 37 talesmen drawn in this case. This can have no bearing on how the Clerk and Commissioner acted (see page 23 above). But the statements made are inaccurate. We summarize the record in Appendix D.

III

THE EVIDENCE SUSTAINS THE VERDICT AND JUDGMENT

A. BASIC FACTS.

On the first appeal on the merits, it was claimed the evidence did not support the verdict. This court considered and rejected that claim (C.C.A. 9, No. 10681; 149 F.2d 738, 788). The evidence on the second trial was sub-

86. See the *Lewis Case*, quoted in note 79 above.

stantially the same, except that in some respects the evidence strengthened the defendant's position.[87] Our statement of the case will follow that in our brief on the earlier appeal with appropriate reference to this record. Appellant's brief, as on the jury question, tells only part of the story. It disregards the rule that the verdict has resolved all conflicts in favor of appellee, disregards inferences favorable to appellee and distorts the evidence by selecting only those parts of it thought to help appellant. This makes it necessary briefly to review the evidence.

Most of the testimony of what occurred before the day of the accident, comes from appellant. He testified, as well, to what happened on the day of the accident up to the time he jumped from the train. In view of the claim of mental abnormality, it is significant that he testified, in some detail, from his own recollection.[88]

1. Appellant's Actions Up to the Day of the Accident.

Appellant, his fiance, whom he had known about 3 months, and his friend, Johnnie Morris, left San Francisco on Saturday, February 17th, 1940, and arrived in

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87. Testimony and evidence by interrogatories and documents was exactly the same of course and the testimony of 4 witnesses, Wilcox, the express messenger, conductor Cosgrove, Dr. Bernard, and Carl Smith, investigator for the California Motor Vehicle Department, was exactly the same because given by reading their testimony of the first trial.

Witnesses who were not called at the first trial were engineer Tassi, called by the plaintiff and the ambulance driver Laity and deputy Sheriff Parks, called by the defendant.

88. He said that in testifying on his deposition in April, 1941, on the first trial in November, 1942 and on this trial he was testifying from his "own memory and not what someone else told" him (483, 484). Compare our brief on the earlier appeal, p. 41, note 85. Dr. Anderson testified that one of the aspects of alcoholic psychosis is loss of memory (647, 657-659). He had no loss of memory.

Reno next morning. The object of the trip was his marriage to his fiance. They were married in Reno on the 18th (373, 412, 413, 484-494). All three went to the Senator Hotel,[89] about 8 blocks from the Southern Pacific Depot, and stayed there through Friday, the 23rd (414, 485, 494-496).

On Monday, the 19th, appellant quarreled with his wife[90] and started drinking[91] (413, 485, 486, 496, 498). Monday through Thursday he drank and gambled. His drinking was in the hotel room with Morris; they drank about one bottle of bourbon a day, and perhaps had some drinks in a bar[92] (374, 501-504). Possibly by Friday, and certainly by Saturday morning, he had lost all their money—they were all broke (413, 501, 504). He was not sure whether he drank on Friday (504). At any rate, on Saturday they were out of money and left the Senator Hotel with their bill unpaid, leaving their bags (514, 516). On deposition

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89. He did not remember the names of the proprietor or the room number. When asked whether he registered as "George Wendell and wife—Marin County" he said "A. No, it is not—not that I—no."; that if he used another name he was drunk (494, 495).

He, his wife and Morris did not use their right names (769-773). They occupied rooms 338 and 337 (1044) and the names registered for room 338 were "George Wendell and wife, Marin County, California" (771, 772).

90. He said his wife told him she had been married twice before and didn't care for him; that he had known her and her father about 3 months but had not known she had been married; that he had so testified on deposition and on an earlier trial and now so testified (487, 488). Yet the affidavit for marriage license which **he** signed showed she had been married before! (488, 489, 493).

91. **After** he was asked whether he registered at the hotel under a fictitious name (see note 89) he was inclined to move some of the drinking up to Sunday the 18th (495-497). Earlier, on his deposition (498) and on the first trial (500) he said he **started** after the quarrel on Monday.

92. Hardly enough to produce DTs in view of the fact Mrs. Thiel drank some of the whisky (503).

he testified that on Saturday he had only 10 cents left, put this in a slot machine, got 80 cents, and with this bought whisky[93] (505 et seq.).

Appellant says that on Saturday, the 24th, he was nervous, upset and sick; that he had hallucinations[94] (489, 515); that he was out of money and anxious about getting home (515). Saturday night he and his wife stayed at a different hotel (414, 485, 489).

Appellant had nothing to drink for over 24 hours before he jumped out the train window.[95] The amounts of alcohol he had taken were not excessive; give no foundation for hallucinations that harm threatened.[96] There is nothing to show that he was not fully oriented, that he did not fully appreciate his surroundings, know where he was and what he was doing. He did not try to run away.

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93. On the trial he tried to move this to Sunday morning (505). But the rest of the record makes it clear he drank nothing on Sunday and the date was not corrected on the deposition though other dates were (505-513). See note 95.

In any event it was stipulated that he was sober when he got on the train and he so testified (541, 587).

94. On this trial for the first time appellant enlarged on the claimed Saturday night hallucinations; said that he spent all night on top of a dresser, did not go to bed, did not take his clothes off, threw sticks down a light well, etc. Yet, in the same breath, he says his wife was with him all the time and was unmoved by his antics (516, et seq.). His deposition clearly indicated that he did go to bed (516). He says that he did not change his clothes (489, 490). Evidence of his neat appearance the next day contradicts his story.

95. At one point he said he drank nothing even on Saturday (514) and on his deposition said the slot machine episode may have been on Friday (see 505-513 and note 93). In any event it was stipulated he was not drunk Sunday afternoon and evening.

96. His fears were also for Morris and Mrs. Thiel, he says (415, 433, 439, 557) a subjective symptom said by plaintiff's witness Dr. Anderson **not** to be a symptom of alcoholic psychosis (647, 660). He says he feared for his wife on the train. But he left her alone (557).

2. Appellant's Actions on Sunday, Feb. 25, 1940, Until Just Before Train Time.

Appellant says that on Sunday, the 25th, he was nervous, and afraid.[96]

Appellant had nothing to drink on Sunday, the day of the accident (484, 525-530; see notes 93 and 95). He got up about 6 a. m., before sun-up, and left the hotel. Although he claims to have been in fear, before sun-up, he wandered around Reno, alone (418, 489, 525-530). When he left he asked his wife to meet him at the Southern Pacific Depot at 11 o'clock. About 11 o'clock he met her and Morris there. That was the first time he had been there or had any contact with appellee since arrival in Reno (418, 419, 428:1; 489, 522, 525, 526). From the time he arrived at the Southern Pacific Depot until he boarded train No. 9 he stayed in the waiting room, in front of the ticket office, except when all three left for the Western Union office (376, 427, 428, 530).

Before 4 o'clock Mrs. Thiel phoned her mother collect to have money wired. Appellant told his wife what to say (431, 532). All three waited at the station for a reply until about 6 P. M. (427, 428, 530, 545), when they heard the money had been wired, left, and walked to the telegraph office[97] (427, 431, 432, 530, 533). It was then dark (537, 538). From there they walked to the police station and were interviewed (377, 434 et seq., 531), the police saw no reason to detain them and suggested they take their train for San Francisco[98] (1032, 1033, 1035-1041), they walked

97. Although he says he was afraid and the money was wired to his wife he could not or would not say why he went with them instead of staying at the station (538).

98. There is no claim the railroad knew anything about what happened at the police station. Each of the three was inter-

to the Senator Hotel, paid their bill,[99] got their bags (436, 531, 539), walked back to the railroad station, arriving about 8 o'clock, having stopped to eat on the way (430, 436, 437, 531, 539, 540, 545), and were there till the train arrived (531).

3. Appellant's Actions From the Time He Returned to the Depot Until He Went Through the Train Window.

The railroad station was lighted and there were people in the waiting room (538). Tickets for San Francisco were bought (546). When the train arrived appellant, his wife and Morris got on the head end of the second coach, on the station side, practically in front of the waiting room, went into the second coach and took seats. Appellant got on without assistance (549 et seq., 619). Rippetoe followed immediately behind them. This was the first time Rippetoe noticed appellant. Nothing had attracted his attention to the three people (614, 619, 620). Yet he had been in the depot since about 4:30 (618).

After the train left Reno, appellant, Morris and Rippetoe

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viewed by Detective Sergeant Castlebury and Thiel said he was in danger and was being followed (1029-1031). Thiel did not appear drunk and there was no odor of alcohol (1032). Castlebury, after observing and interviewing them advised them to take their train to San Francisco and said he had no facilities "to guard anyone who apparently didn't need any assistance along that line," and that since he was accompanied by "two normal adults, that he felt that he was in perfect safety" (1033). The Reno police had facilities for caring for people who might harm themselves. When in his judgment there was such a case Castlebury used these (1041). But he never assumed that Thiel should be detained or guarded (1040); he was coherent, knew where he was and looked normal (1037-1039) and no effort was made to detain him and no record or report was made because it was not thought warranted (1035-1036).

99. Although he says he was acting queerly and his wife and Morris knew it, he was given the money received and paid the hotel bill! (539).

went from the second coach to the smoker (370, 453, 552, 556, 557, 560, 611, 614, 623). Appellant and Morris took a seat, Thiel next to the window, and Morris on the aisle. Rippetoe was in the seat ahead (450, 561, 612, 613, 633). There was a trainman in the back of the car (450, 451, 561, 905).

About 20 minutes out of Reno, but still in Nevada, the conductor came through lifting transportation (452, 561, 562, 608, 613, 1074). When he reached Morris and appellant, Morris stood up. According to appellant Morris was standing talking to the conductor (562, 624, 626), and according to the conductor the conductor had passed on a step or two (1077, 1095) when appellant suddenly opened the window and leaped out (454, 562-565, 613-615).

Appellant undertook to testify in detail to what happened in the smoker, how and why he went out the window and what led up to this. But when he was not testifying in his own law suit his statements were different. At Truckee he was helped by Carl E. Smith, an employee of the California Motor Vehicle Department (1053). He told Smith he had been on relief, looking for a position in Reno, was desperate, did not know what to do and that was why he jumped (1054).

William H. Laity drove the ambulance which took Thiel to Reno. It was a converted seven-passenger standard automobile. To get the ambulance couch in it was rebuilt. The right half of the front seat was removed and the couch extended into the automobile so the patient's head was next to the driver (926-928, 936). On the way in Laity and Thiel talked intermittently (931, 934). Laity asked what happened and Thiel said:

> "Well, I really don't know." He said, "There were three of us sitting in front of the coaches, and the

other gentleman and I went forward to the smoker,'' and he said that, ''We were sitting there, and on the spur of the moment I raised the window and jumped,'' and then he said, ''I don't know why I did it.'' He said, ''I don't want to die now. At that time I did.'' (932:12-18)

Thiel said: ''I don't know what came over me. I raised the window and jumped out'' and gave no reason at all (935).

Next morning, in the hospital, about 24 hours before he was seen by Dr. Wyman (675, 692), Parks, chief criminal investigator for the District Attorney and Sheriff at Reno (948), after receiving permission from the head nurse, talked to Thiel in the presence of the head nurse (949, 950, 953, 955). Thiel told Parks that ''he jumped on the spur of an impulse, and before he reached the ground he was sorry he had jumped'' (959).

Months later at the San Francisco Hospital he signed a statement that he was ''confused about the details of the accident and at the present time cannot remember exactly how it happened. Patient states he had not been drinking'' (569-573).

4. Appellant's Testimony of His Mental Condition and Claimed Notice to Appellee.

This case presents grave questions of appellant's veracity. He has testified to what he thinks are new helpful details of his Saturday night hallucinations, now disclosed for the first time to anyone (see note 94) to an untruthful statement that he did not know his wife had been married before (see note 90), hesitated and then denied that he registered under a fictitious name (see note 89) and was squarely contradicted repeatedly. We might omit any

reference to his testimony. The jury was entitled to disregard all of it. But this is what he says:

On Sunday he feared he, his wife and Morris would be harmed (see note 96). He complained to others (415, 432). People in the station looked like they were practically all after him (437). Just before he jumped he saw a man ahead in the smoker who appeared to have a knife in his chest (454). On the first trial he said he did not know the train was moving (R. 574). But after his witness, Dr. Anderson, testified that appellant told him he became frightened as the train swung around a curve (R. 635, 636), this pretense was given up, and appellant testified that he went to the smoker and the conductor came through, after the train left Reno (561).[1] On this trial there was no such pretense (561). He further testified:

After he first arrived at the station two ticket sellers were on duty (429). He told one that he was afraid to leave the station, and to call a policeman. He heard Morris asked for a policeman, and say he could not handle appellant[2] (428, 432, 437, 440). Morris made similar statements after return from the telegraph office (439, 440). Appellant asked for a policeman to ride the train, and was told one would be along soon (437, 438).

After the tickets were bought a railroad policeman, in uniform, arrived (438, 546), and appellant asked the officer to ride the train (439-443, 736).

After the train arrived the policeman did not get on the train, so appellant got off, found him, and the police-

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1. See Appellee's Brief in No. 10,681 at page 45.

2. If Morris made such a statement it was untrue. There is no evidence anyone had trouble handling appellant. But appellant's testimony does indicate a consciousness that he had committed himself to Morris's care.

man got on the train and sat near appellant[3] (445, 550, 738-741). Later appellant noticed that the policeman was gone and became frightened (448).

5. Further Testimony as to Appellant's Appearance, Conduct, and as to Alleged Conversations.

Appellant's witness, Dr. Anderson, testified: Patients with delirium tremens have hallucinations; they are anxious, have "a flushed face", perspire profusely, have a course tremor, jerky movements, and rapid pulse; these signs would be quite apparent to lay people (655, 656). (No witness, not even appellant, testified to the presence of any of these signs.) He also said the fears are for self, not others[4] (647, 660).

Mr. Forsyth was the ticket agent from 8 a.m. to 4:30 p.m. (794-796). He first noticed appellant and his companions when they came to the ticket window, between 10 a.m. and noon, to have him accept a collect telegram wiring for money. He could not, and suggested that they 'phone collect. They came back from time to time to inquire for a reply (796-798). The party was under his observation until he went off duty (798, 799).

Morris was about 5 feet, 10 inches tall, and weighed at least 160 lbs. The woman was tall for a woman and very heavily built. Appellant was not over 5 feet 6 inches, and slim (796, 797). All were neat in appearance (797). Morris and the woman were sober, coherent and normal (799). Appellant looked like a man who had a hangover. He talked coherently and was oriented. He did not have the "shakes", and appeared normal. He knew where he

3. Every other witness on the subject contradicted this.

4. See note 96. The reaction is to shield self from harm; it is not the attitude of one seeking harm but exactly the opposite.

was and with whom; he did not stumble or stagger; his face was not flushed; his movements were not jerky; he caused no disturbance or commotion; there was no loud talk or gesticulation. He was not extremely nervous and restless; no more than hundreds of passengers who wait for a train (799-801, 805, 811, 812).

Someone said that appellant had been drinking (810). He learned that appellant was afraid to leave the station but not why (807). Nothing was said about fear of life, nor were inquiries made about police (801). When Mr. Wogan came on duty Mr. Forsyth told him that the party was waiting for money, and that apparently appellant was afraid to leave the station (810).

Mr. Wogan, a ticket clerk at Reno for 18 years, was on duty from 4 p.m. until midnight (813). Mr. Forsyth told him that appellant appeared afraid to leave the station (814, 837). The statement lost significance when, later, appellant did leave (821). Mr. Forsyth also told him of the 'phone call for money (814). Mr. Wogan observed the party from time to time. They were well dressed. He talked only to Mrs. Thiel. She inquired about the money and a restaurant (813-817). Later they left the depot (821). There was no other conversation before they left (814-816). They returned about an hour and a half later (816).

Throughout appellant was attended by his two companions (813). Because of what Forsyth had said Mr. Wogan gave them close attention. He saw no basis for the remark. His description of the party corresponded with Mr. Forsyth's (817, 824). Mrs. Thiel and Morris were sober, normal, and under no incapacity (817, 818). Appellant appeared entirely normal (817, 818, 824, 825, 830, 836). He was not demented (842). He did not have the shakes, his face was not flushed, and his movements were neither

irregular nor jerky (821). There was no gesticulating, argument, noise, row or anything of that sort (818, 823). Thiel was nervous, but not more so than normal passengers. He did not look drunk or alcoholic (817, 818, 834). He did not then appear to have a hang-over (834). The party appeared to be in proper condition to be sold tickets (834, 836, 837).

Mr. Wogan had no conversation with either of the men (816, 817, 819). About 8 o'clock he sold Mrs. Thiel 3 coach tickets (816, 819). Although appellant looked normal, in view of what Forsyth had said, he asked Mrs. Thiel, as the best source of information, whether anything was wrong with appellant. She said that he was somewhat nervous, but for no definite reason; that it might be the altitude; that he was disturbed by too many people. She declined to take a drawing room (819, 833, 835). Mr. Wogan flatly denied any such conversations as appellant had testified to that appellant was afraid, or police protection was requested (819, 826). Because of what Mr. Forsyth said, when the railroad policeman came on duty Mr. Wogan asked him to observe appellant (822, 836).

Mr. Sorenson, a railroad police officer regularly commissioned by the Governor of Nevada, but paid by Southern Pacific Company, came on duty in uniform and with his badge at about 8:30 p. m. (443, 582, 585, 842-844). He observed appellant and his companions, but had no conversation there with either Mr. or Mrs. Thiel in the station (845, 874). Morris said that Thiel had been drinking heavily lately, was "acting crazy", and that Morris had come to bring him home; that Thiel had tried to run away once; "After I get him on the train then I will be all

right'' (595, 844, 848, 875, 876-886).[5] He observed the party until the train left (849), but had no further conversation, except as noticed below. Appellant looked normal and was not drunk (849, 850, 879, 887, 888, 890, 891). Mr. Sorenson denied that he was asked to ride the train, or was told appellant was afraid or would harm himself, or would not go without protection or that he, Sorenson, said he would go along (845). Mr. Sorenson followed the party to the train, but did not go in the car. Before the train left he got on the car platform and looked in, as he often did, but he did not go in (850, 851, 875).

While Mr. Sorenson was on the station platform, appellant came out, but returned at Mr. Sorenson's suggestion. He did not ask Mr. Sorenson to go with him. Later Morris came along and Mr. Sorenson said that Thiel had stepped out of the car, to which Morris replied that it was all right, ''I'll take care of him now'' (850, 851, 878). Before the train left Mr. Sorenson told a brakeman that appellant had apparently been drinking, and suggested that he keep an eye on him (892-902).

Mr. Sherman, the brakeman, testified that he was not at the car entrance all the time, but that while he was there Morris came out and said to the policeman, ''It is all right, I will look out for him'', which prompted Sherman to ask what was the matter. The policeman said, ''I think he has been drinking'' (903-905). Appellant did not look drunk. There was nothing wrong with him that Mr. Sherman saw (906, 918).

Mr. Cosgrove,[6] the conductor, first noticed appellant

5. Thiel claims to have been present at the conversation (735 et seq.). When Sorensen testified plaintiff made some objection but plaintiff himself put in the same matter without limitation by reading an answer to an interrogatory (595).

6. He died before the second trial and his testimony at the first trial was read so it was exactly the same.

when he was collecting the tickets; that till then there was no conversation with appellant or any of his companions (1075, 1076, 1085). He noticed nothing unusual with appellant. He was just sitting quietly in his seat (1078, 1114).

Appellant's witness **Rippetoe** had been at the station since 4:30. He got on the train just behind appellant and his companions. Nothing attracted his attention to them. He sat behind Thiel. He did not notice appellant before he got on the train; there was no loud talk or arguing, and he heard nothing said about appellant not wanting to stay on the train. Thiel did not talk to the conductor. While the policeman got up on the car, he did not come in and sit down as appellant testified (612-615, 619-621, 625, 626). There was nothing unusual in the smoker (633).

Appellant's witness **Buck** was a passenger. He got on at the rear and walked through to the smoker. He saw nothing unusual. His attention was first attracted by the commotion when appellant went through the window (708, 709).

6. Appellant's Condition Was Not in Fact Such as to Require Special Care or Attention From Appellee.

The claim that appellant was in an abnormal mental condition before he jumped can be supported only by what appellant himself said as a witness and by his testimony of hearsay conversations. And plaintiff's veracity as a witness was open to grave question.[7]

The conversations prove nothing. They were admissible, in an attempt to impute notice, but are no evidence of the

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7. His testimony is inherently inconsistent. It does not square with his own medical evidence (see note 96 above). It is contradicted in almost every particular where others were present and available to contradict it, including his own witnesses. It is contradicted by his own conduct and statements. See note 8 below.

fact. They are untrue. If Morris said appellant was acting crazy, was hard to handle, and had tried to run away, it was untrue. There was no basis in appellant's conduct. The only basis could be what appellant said. Appellant may have said that he was in fear. He had quarreled with his wife. What motive of self-pity, to attract attention or sympathy, he had he does not say. It is a legitimate inference that he was talking for effect.[8]

But there is something more substantial. There was nothing unusual in appellant's appearance. Not even he testified to any abnormality in appearance or action, or any outward symptom of D. T.'s. To anyone who saw him he was normal.[9] There was nothing wrong with his perception or recollection.[10] He described in detail the events of the week in Reno. Although he claims to have been in fear of injury, he wandered around Reno in the dark early on Sunday morning. He had little, if anything, to drink since Friday. His speech was normal, coherent and rational. He claimed to remember conversations. He remembered and recited in detail the events of the day of the accident, and the construction and arrangement of the station (534 et seq.; 795). He knew who he was with, what he was doing and where he was going. He recognized policemen, ticket sellers, the Western Union office, hotels, a police station, a place to eat, etc. He knew he needed

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8. He never explained why he registered at the Senator Hotel under a fictitious name (note 89 above) or how he could have been ignorant of his wife's previous marriage when the fact was stated in his affidavit on application for a marriage license (see note 90 above).

9. Compare the conclusion and conduct of his own witness Castlebury (note 98 above).

10. Want of memory is one of the symptoms of DTs. His Dr. Anderson so testified (647, 657-659). See note 88 above.

money and what to do to get it. There was no loud talking or unruly conduct, gesticulation or commotion. He required no assistance. He moved normally. He knew he was getting on a railroad train, and where it was going. He knew with whom he got on. He got on willingly. He knew tickets must be bought and surrendered. On the train he appreciated where he was, and, after the train left Reno, that it was moving. At all times he was accompanied by two people capable of caring for any need, one of whom, with his acquiescence, had assumed to do so and so stated.

B. APPELLEE WAS NOT GUILTY OF NEGLIGENCE IN BEING UNABLE TO PREVENT APPELLANT FROM LEAPING FROM THE TRAIN.

Since the sufficiency of the evidence was argued to this Court and passed upon we will not enlarge on the cases. Most of our cases were cited to the Court on the earlier appeal and were abstracted and quoted for the convenience of the Court, in Appendix H to our Brief. Most of the cases which appellant cites were dealt with in Appendices D and I. This matter is available to the Court and we do not repeat it.

It is argued that appellee owed to appellant the duty of the highest care and is liable for slight negligence. While ordinarily as to transportation a common carrier owes that duty, this rule does not apply where the risk realized was injury to the passenger from his own conduct. (*Fagerdahl v. Coast T. Co.,* 178 Wash. 482, 35 P.2d 46.) A passenger's disability, if any, does not change the carrier's duty or increase the degree of care required. It is only a circumstance in view of which care is to be used. (See Appendix D of our brief on the earlier appeal, es-

pecially *Alabama etc. R. Co. v. Alseep,* 101 F.2d 157 (C.C.A. 5); *Gulf etc. R. Co. v. Conley,* 113 Tex. 472, 260 S.W. 561, 563.) Under any rule the carrier "is bound to guard only against those occurrences which can be reasonably anticipated," and a "reasonable man * * * will neither neglect what he can foresee as probable, nor waste his anxiety on events that are barely possible." (*Atchison etc. Co. v. Calhoun,* 213 U.S. 1, 9, 53 L.ed. 671, 675; *Kansas City Southern Ry. Co. v. Pinson,* 23 F.2d 247 (C.C.A. 5).)

Nor is there any occasion to discuss intoxication and negligence or contributory negligence. Intoxication does not excuse negligence, nor does it affect defendant's duty, except only where a plaintiff is obviously so intoxicated as to be helpless, and is seen in a dangerous position. This was discussed in Appendix E of our brief on the first appeal.[11] There is no case where intoxication affected the result, except where the injured party was, to the knowledge of the carrier, **incapable of caring for himself.**

Appellee was entitled to judgment as matter of law unless appellant was under a known disability. (See appellant's brief, pp. 61, 62.)

The first essential is the existence **in fact** of the requisite disability. The only disability claimed was mental.

Just any mental incapacity—any deviation from the normal sober person—will **not** do. The evidence must show "need of special attention" and "that the passenger is at the time **incapable of taking care of himself.**" (*Welch v. Spokane etc. R. Co.* 91 Wash. 260, 157 P. 679, 681.) The passenger must be "in a helpless condition."

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11. To the cases there cited can be added *Pennix v. Winton,* 61 C.A.2d 761, 143 P.2d 940 (hr. den.); *San Antonio etc. Co. v. Fraser,* 91 S.W.2d 948 (Tex. C.A.); *Bageard v. Consol. Tr. Co.,* 64 N.J.L. 316, 45 A. 620; *Fisher v. W. Va. etc. Co.,* 42 W. Va. 138, 24 S.E. 570.

(*Gates v. Bisso Ferry Co.,* 172 So. 829 (La. App.).) Special attention is required only "under special circumstances" and "the mere fact that a passenger is drinking or under the influence of liquor is not enough"; "intoxication that does not produce helplessness or incapacity" will not do; if the passenger is "merely rendered less capable of protecting himself from accident or injury, than he otherwise would be, or his condition induces him to become more indifferent to his safety, he must take the consequences of his own recklessness," and "his right to recover is no greater than would be that of a sober person." (*Louisville Ry. Co. v. Gregory's Adm'r,* 141 Ky. 747, 133 S.W. 805; *L. & N. R. Co. v. Barnes' Adm'x,* 297 Ky. 616, 180 S.W.2d 547.) This requirement is not confined to drunks; in other cases it must render the passenger "unable to care for himself." (*St. Louis etc. Ry. Co. v. Adams,* 163 S.W. 1029 (Tex. Civ. App.).)[12] The incapacity must have relation to what it is claimed the carrier failed to do. If the loss of a leg requires special care, it does not impose liability for failure to prevent suicide.

At least until appellant went through the window[13] he was not incapable of caring for himself. If there were any

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12. See also *Paris etc. R. Co. v. Robinson,* 104 Tex. 482, 140 S.W. 434; *Louisville etc. Co. v. Mudd's Admr'x,* 173 Ky. 330, 191 S.W. 102; *Dabuey v. R. Co.,* 140 Ill. App. 269 and *R. Co. v. Carr,* 47 Ill. App. 353 quoted in the *Welch Case* above; *L. & N. R. Co. v. Phelps' Admr'x,* 181 Ky. 689, 205 S.W. 793.

13. Even this does not necessarily indicate that at that time appellant was suffering such mental derangement as to require attention from anyone. A deliberate and thoughtful intention to harm one's self is not a disability within the rule we are discussing.

But even if it could be assumed that this act alone was evidence from which an inference could be drawn, it was evidence of a mental condition only at **that** time. It is no evidence of mental attitude at an earlier time. All the other evidence, upon which he relies, indicates that he was in fear of harm, sought

deviation from normal, it was an unfounded fear of harm and a desire to avoid it, with mental capacity to know how; not a mind that invited injury.[14] (Cf. *Chicago etc. Ry. Co. v. Sears,* 210 S.W. 684 (Tex. Com. App.).)

Even if the requisite disability exists, this is not enough. Its existence must be known to the carrier. The carrier has no duty to examine passengers. It can presume they are sane and sober until it has actual knowledge to the contrary. The doctrine of constructive notice has no application. (*Fagerdahl v. North Coast T. Co.,* above;[15] *Watts v. Spokane etc. R. Co.,* 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin,* 54 Ariz. 180, 94 P.2d 639;[16] *Paris etc. Co. v. Robinson,* 104 Tex. 482, 140 S.W. 434, 439;[17] *Shipman v.*

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protection from it, and knew what steps to take to get protection from the harm he feared (compare *Chicago etc. Ry. Co. v.* Sears). Moreover, while we have this evidence of his rash acts before us now, as one of appellant's cases, *Dokus v. Palmer,* 130 Conn. 247, 33 A.2d 315, 318, points out "the defendants at the time of the accident had not."

14. If his condition were as claimed by him and appellee knew it, it could reasonably anticipate this and act accordingly. See Dr. Anderson's testimony, p. 49 above.

15. Stating the rule by quotation from *Sullivan v. Seattle Elec. Co.,* 51 Wash. 71, 97 P. 1109, 1112, and *Welsh v. Spokane etc. R. Co.,* 91 Wash. 260, 150 P. 679. The *Sullivan Case,* opinion by Rudkin, J., later Senior Circuit Judge of this Circuit, held an instruction prejudicially erroneous which permitted recovery if the carrier's agents, although they did not know of the disability, should have known of it. In the *Welsh Case* it was said that there was not even a duty of "observation" to ascertain the passenger's condition.

16. "But if the carrier does not know of the abnormality it owes no more care to the abnormal than it would to a normal passenger, and it is under no duty to make an investigation to determine the condition of the passenger."

17. Accord with the cases above that there is no duty of examination or even of observation: *So. P. Ry. Co. v. Hayne,* 209 Ala. 187, 95 So. 879; *Ill. C. R. Co. v. Cruse,* 123 Ky. 463, 96 S.W. 821; *Willets v. Buffalo etc. R. Co.,* 14 Barb. (N.Y.) 585; *Gulf etc. R. Co. v. Garner,* 115 S.W. 273 (Tex. Civ. App.); *W. & A. R. Co. v. Earwood,* 104 Ga. 127, 29 S.E. 913; *Scott v. U. P. R. Co.,* 99 Neb. 97, 155 N.W. 217.

United etc. Co., 70 R. I. 454, 40 A.2d 730.) If the passenger's condition is revealed only by the accident, there is no liability. (*Welsh v. Spokane etc. R. Co.,* supra; note 13.)

But more, **the carrier must have actual notice of the precise kind of disability.** If it has notice of one disability it cannot be held for failure to guard for a different disability. (*Fagerdahl v. North Coast T. Co.,* above; *St. Louis etc. Co. v. Adams,* 136 S.W. 1029 (Tex. Civ. App.); *Chic. etc. Ry. Co. v. Sears,* above. Compare *Welsh v. Spokane etc. Co.,* above; *Watts v. Spokane etc. Co.,* 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin,* above; *St. Louis etc. R. Co. v. Dobyns,* 54 Okla. 643, 157 P. 735, 738.)

What was appellee's knowledge? There was nothing in appellant's appearance or actions to indicate mental disturbance. Passing from what appellee could observe to what appellant claims was told (whether true or untrue),[18] and assuming knowledge of the railway policeman is ours (a matter not free from doubt, to say the least),[19] it re-

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18. His claims were denied.

19. For notice to an agent to be imputed to the principal the agent must receive it while acting within the scope of his authority and for his principal, it must touch or concern some matter within the scope of his agency, and must be a matter he is under a duty to communicate to his principal. (*Paine v. Trustees,* 7 F. 2d 174, 176; *Missouri etc. Co. v. Belcher,* 88 Tex. 549; 32 S.W. 518, 519.) This rule has been applied to notice of the condition of a passenger. (*Chicago etc. R. Co. v. Sears,* 210 S.W. 684; *Pinson v. So. Ry. Co.,* 85 S.C. 355, 67 S.E. 464, 466.)

Where railroad policemen are appointed under authority of statute, although paid by the railroad company, they are exercising authority conferred upon them by the State, and while pursuing that authority are not agents of the railroad. The Nevada statute and the cases on this general proposition are dealt with in Appendix E. Here railroad police officer Sorenson was appealed to as, and because he was, a **police** officer. He was not appealed to, and was not acting, as an agent of the Southern Pacific Company. He was acting under the authority conferred upon him by the Governor of Nevada. When it was sought to

mains that what was told comes to this: Appellant did not like crowds, feared someone would harm him, was afraid to leave the station (although he did leave it) and wanted protection—not general protection, but protection from gangsters. That appellee was told he had been drinking, was meaningless. He was not then drunk, and did not appear to be. There is no claim appellee was told (1) he would harm himself or had threatened to, or (2) did not want to go on the train. He had not tried to harm himself. His mental attitude was one of avoiding harm. He did want to go on the train. He offered no resistance, and had no attitude of resistance.

There was no one threatening appellant. Appellee knew this. So it comes to this: We are told that appellant wants protection from non-existent harm from non-existent persons. As matter of law or fact, what steps should we have taken to protect him from a non-existent threat of harm? What could we anticipate from a non-existent condition? (Compare the *Sears* and *Adams Cases.*)

We knew nothing which would give rise to a reasonable anticipation that harm would come to appellant. We had no notice of any mental condition such that harm would result, or that appellant was in a position of danger when there was still time to act to prevent injury. Until appellant went out the window he never was in danger. (See note 14, p. 58 above.)

Even when passengers are disabled, from drink or otherwise, and are **unattended,** if not in a position of danger

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introduce evidence of conversations with him this precise objection was made, but was overruled. See particularly the decision of this Court in *Red River Lumber Co. v. Cardenas,* 95 F.2d 157, noticing at 159 that "**the acts of a special policeman are presumed to have been done in his capacity as a public officer.**" To the same effect *Erie R. Co. v. Johnson,* 106 F.2d 550 (C.C.A. 6). See Appendix E.

the carrier need not act against a risk not then present. It need not guard the passenger "to prevent him from injuring himself, or placing himself in a place of danger". (*St. Louis etc. R. Co. v. Carr*, 47 Ill. App. 353; the *Welsh Case* above.) The rule has been applied to a passenger on a bench in a waiting room (*Fagerdahl v. North Coast T. Co.*, above); asleep on a bench on a ferry boat (*Gates v. Bisso Ferry Co.*, above); on a platform of a car stopped on a trestle (*Louisville Ry. v. Gregory's Adm'r*, above); seated in moving railroad cars (*Olson v. Minn. etc. Ry. Co., v. Adams*, 43 N.D. 371, 175 N.W. 371. See also *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 P. 1109, and *Thixton v. Ill. C. R. Co.*, 29 Ky. 910, 96 S.W. 548).

Where a passenger under a mental disability is with an attendant or companion apparently capable of caring for him, the carrier owes no duty of special attention, and is not liable if the passenger hurts himself. (*Gates v. Bisso Ferry Co.*, above; *Boyd v. Alabama etc. Co.*, 111 Miss. 12, 71 So. 164, and 655; *Olson v. Minn. etc. R. Co.*, above. Cf. *Fagerdahl v. North Coast T. Co.*, above. These cases deal with intoxicated or otherwise mentally incapacitated passengers. Compare: *So. Ry. Co. v. Hayne*, 209 Ala. 186, 95 So. 869; *Arnett v. C. & O. Ry. Co.*, 198 Ky. 742, 248 S.W. 1040; *L. & N. R. Co. v. Dyer*, 152 Ky. 264, 153 S.W. 194.)

Appellee, as to the claim of failing to provide a guard, was entitled to a directed verdict. But, if not, without regard to appellee's evidence, there was a jury question. If appellee's evidence was believed, and it was, there is no liability. The only claim of notice is through the policeman and two ticket sellers. The ticket sellers denied any conversations which could convey notice of any incapacity.

If it cannot be said as matter of law that the policeman was acting only under his commission, in view of the presumption (see note 19, pp. 59, 60) if for no other reasons, the jury could find as a fact that he was appealed to in his official capacity and was acting under state authority and not as our agent.

The jury could and did find that even if we had notice of appellant's condition, there was no breach of duty in the circumstances of this case.[20]

But there is a shorter answer. Morris was in the seat with appellant. Rippetoe was immediately ahead. Conductor Cosgrove was a step away. Appellant went so fast that no one could stop him. Another attendant could not have done more. Any failure to provide a guard was not a cause of injury (*St. Louis etc. Ry. Co. v. Adams,* above).

For closely parallel facts see:

Chicago etc. Ry. Co. v. Sears, 210 S.W. 684 (Tex. Com'n. App.);

St. Louis etc. Ry. Co. v. Adams, 163 S.W. 1029 (Tex. Civ. App.);

Boyd v. Alabama etc. Co., 111 Miss. 12, 71 So. 164 and 655.

With these should be compared:

Olson v. Minn. etc. R. Co., 43 N.D. 371, 175 N.W. 371;

Gates v. Bisso Ferry Co., 172 So. 829 (La. App.);

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20. Appellant makes some reference to a circular and rules put out by appellee (Plf. Ex. 1). (1) The circulars clearly state to what they apply. They apply only to "demented" passengers, or passengers who are incapable of taking care of themselves. (2) Even if they did apply, the question of negligence was still for the jury.

Fagerdahl v. North Coast T. Co., 178 Wash. 482, 35 P.2d 46;

Paris etc. R. Co. v. Robinson, 104 Tex. 482, 140 S. W. 434;

L. & N. R. Co. v. Mudd's Adm'x, 173 Ky. 330, 191, S.W. 102.

In the *Sears* and *Adams Cases* the mental aberration claimed was the same as here,—hallucination of danger from robbers.

No case supports appellant's claim. The farthest any goes is to hold that there was a jury question, and these are distinguishable. The cases above hold that the carrier was entitled to judgment as matter of law. Appellant's cases are reviewed in Appendix I of our brief in No. 10,681.[21]

C. THERE WAS NO NEGLIGENT DELAY IN STOPPING THE TRAIN AFTER APPELLANT WAS OUT THE WINDOW.

Taking estimates from men admittedly in no position to estimate correctly, and disregarding what actually was done, appellant claims delay in stopping the train.

Rippetoe estimated he was holding appellant, dangling from the window, from 1 to 5 minutes (616) but said that in the circumstances it was very hard to judge time[22] (628). Appellant was kicking, trying to get loose (627, 635). He testified that the conductor said "Let him go"

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21. Additional cases cited are of the same sort,—they hold no more than that there was a question for the jury.

22. On his deposition taken by the plaintiff August 3, 1942 (628) Rippetoe said "You know time. You are not much of a judge of time then," (629); that his best estimate was "Well, something like a minute." (630).

(617). This was denied,[23] but could have no bearing because appellant was not turned loose; he was held until his coat broke and he slipped from it (616, 617).

The conductor testified that after he had passed just beyond appellant and Morris he heard a window open and someone holler (1077, 1078, 1095). He immediately turned, got appellant's collar, and held until the coat tore and appellant fell.[24] Up to that time his whole attention was centered on Thiel (1078, 1080, 1095, 1096, 1098, 1102, 1113). He did not remember Rippetoe having a hold (1078, 1096, 1097). As soon as Thiel fell he gave a stop signal (1080, 1102). He could not say whether anyone else did (1102, 1114), but by the time he signaled the train was stopping (1080, 1099).[24] The time from the time appellant "went through the window" "for said train to come to a stop" he estimated at a minute or less (1101, 1107).

The brakeman, back in the smoker (905), saw the conductor lifting tickets. As the conductor turned the window went up and a man went out. He was grabbed immediately by Morris and the conductor (906, 911). Immediately, appellant still being held, Sherman gave a stop signal (906). The brakes were applied at once (907, 912). Sherman immediately got his lantern and went to the rear platform of the car. As he opend the door someone said "He is gone." He gave a stop signal, a "wash-out" with his lantern (907, 912). There was an attempt to suggest that Sherman was too short to reach the signal cord,

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23. The conductor flatly denied he made any such statement (1113). Clark across the aisle heard no such statement (786). Brakeman Sherman testified that he heard someone say "He is gone" (907).

24. Clark corroborates this (790).

but he pointed out that he had been doing it for 33 years (907).

Sherman is corroborated by Buck. He was at the front of the smoker, reading (702, 706). A commotion in back attracted him, he stood and immediately turned (704, 707, 709). He saw a group and a brakeman with his hand up (704). He though the brakeman couldn't reach the cord, but "I could not swear to it." He pulled the cord. The brakeman signaled to do it again (704, 705, 707, 708).

Engineer Tassie testified: He was running about 40 miles per hour (717, 722). He received a stop signal and acted at once with the heaviest brake application he could make safely and made the fastest possible stop (711, 712, 717, 718, 720). He stopped in about 1000 feet,—he could not have stopped in 500 feet (712). He paid no attention to whether the signal was repeated (720, 723). They then backed. It was a dangerous move to back into the face of a following train (714-716).

It is fantastic to suppose that in the circumstances any man could estimate time accurately. The time elements are better spoken by what the men did, than by what they say.

Immediately appellant went out the window he was grabbed. His coat tore at once and he fell. The conductor immediately signaled the train to stop. But the signal already had been given by Sherman or Buck, or both, and the engineer had acted.

D. THERE WAS NO NEGLIGENT FAILURE TO RENDER AID.

On the first trial it was claimed that Dr. Bernard was negligent. On the second trial by stipulation this claim

was abandoned (1013, 1014) and is not now argued. To the contrary a new attempt is made,—an attempt to rely on the California First Aid Kit Law. This is dealt with in dealing with the instructions.

On the eve of trial appellant, over objection, added a new claim,—failure to render aid. Appellee filed written objections and moved to strike (16 et seq.).

The amendment asserted a new and additional cause of action. A ground of objections was that the statute of limitations had run (16 et seq.). Appellee was not required to file a written answer, but by Court order it was deemed that the amendment was "denied and answered" (p. 4, note 12, above).

"Liability for a tort depends upon the law of the place of the injury." (*Young v. Masci,* 289 U.S. 253, 258, 77 L.ed. 1158, 1161; *W. W. Clyde & Co. v. Dyers,* 126 F.2d 719 (C.C.A. 10,—cert. den. 317 U.S. 638, 87 L.ed. 514; *Loranger v. Nadeau,* 215 Cal. 362, 366, 10 P.2d 63; *Restatement, Conflict of Laws,* §§ 377-388; 3 *Beale, Conflict of Laws,* §§ 378.2, 378.4, 379.1, 383.1, 384.1). Nevada law governs substantive rights and duties. Rules of procedure and the applicable statute of limitations, however, are those of the forum, California. (*Michigan Ins. Bank v. Eldred,* 130 U.S. 693, 32 L.ed. 1080; *Royal Trust Co. v. McBean,* 168 Cal. 642, 646, 144 P. 139; *Restatement, Conflict of Laws,* § 603; 3 *Beale, Conflict of Laws,* § 603.1.) In California actions for personal injury are barred in one year (C.C.P. §§ 335, 340 (3)).

Federal Rules of Civil Procedure, Rule 15(c), providing that an amendment relates back does not apply to a different and additional cause of action. (*L. E. Whitham*

Const. Co. v. Remur, 105 F.2d 371 (C.C.A. 10); *Commissioner v. Reick,* 104 F.2d 294 (C.C.A. 3).) Under tests universally applied the allegations added by amendment were the statement of a new and distinct cause of action. (*Phoenix L. Co. v. Houston Water Co.,* 94 Tex. 456, 61 S.W. 707; *McKnight v. Gilzean,* 29 C.A.2d 218, 84 P.2d 213, hr. den.) The new matter does not seek recovery for the same injury as the original claim (*McKnight v. Gilzean,* supra; *Emel v. Standard Oil Co.,* 117 Nev. 418, 220 N.W. 685; *Westover v. Hoover,* 94 Neb. 596, 143 N.W. 946; *Box v. Chicago Ry. Co.,* 107 Iowa 660, 78 N.W. 694). The duty to render first aid, if there is a duty, and certainly a claim of violation of a California statute is separate and in the nature of things could arise only after the original occurrence. (*Cf. Hartmann v. Time, Inc.,* 10 Fed. Rules Service 94 (C.C.A. 3); *Summers v. Dominguez,* 29 C.A.2d 308, 84 P.2d 237; *Restatement, Torts,* § 322, particularly comment D.) A claim of breach of this duty is necessarily distinct. It was barred by the California one-year statute.

Assuming it was not barred, still no negligence was shown. As soon as the train could be backed—i.e., protected against a following train—it was backed to appellant (907, 1080). Sherman got a stretcher from the baggage car, appellant was put in the baggage car (714, 721, 920, 922, 1046, 1081), and rushed to a doctor (721, 1051, 1081, 1083, 1109).

Conductor Cosgrove was the first one to reach appellant (1107). Inquiry was made of the Pullman porter for first aid equipment, usually carried in the Pullman car, but there was none (922, 1107). However, while appellant

had bled, he was not bleeding much (1107, 1109). The conductor fearing infection, did not bandage with sheets from the Pullman car (1107). If he had wasted time looking for string or wrapping it would have taken another 25 to 30 minutes. In that time they got appellant to the doctor (1108). It was the conductor's idea to get him to Truckee as fast as possible (1109).

Mr. Wilcox, the express messenger, made space for appellant in the baggage car. Mr. Wilcox had two banks of steam pipes in the baggage car. One was on. He turned on the other, the double bank. It was hot in the car. Appellant was not bleeding badly. He lost about a pint. All haste was used to get to Truckee (1046-1052; cf. 696). Dr. Bernard attended appellant at Truckee (1063, 1064). Appellant was suffering from shock, and open, dirty wounds (1063). There had been and was very little bleeding. The crushing nature of the injuries had controlled the flow of blood. A tourniquet was not called for. He had not bled enough to affect him (1067, 1068, 692, 693, 1070, 1071). Dr. Bernard and Dr. Wyman both testified that the immediate first aid required, and given by Dr. Bernard, was of such character that it could not have been given, even by a registered nurse (694).

The testimony of Drs. Anderson and Wyman shows that the steps taken for appellant were proper; that the immediate steps were to control bleeding, splint obvious fractures, keep the patient warm and combat shock and get him to a doctor (648-650, 662, 666, 667). A tourniquet only controls bleeding (649, 664, 692). If, as a result of a traumatic wound, bleeding is controlled, a tourniquet is not needed (665, 693). Dr. Bernard, who saw the man, testified

that no tourniquet was necessary. As to splinting, Dr. Anderson testified that 15 minutes would be better spent in getting the man to a doctor than taking time to hunt up a splint and to apply it (666, 667; cf. 695-697), that an open wound with dirt ground in could not be cleaned except by use of instruments, operating room equipment and anesthetic (661, 663, 694) and what should be done is a matter for the person on the scene (669), that if there were any infection, it would have come from the wounds at the time of injury (661, 663) and that if a wound would not come in contact with anything, it would be better to leave it exposed to the air than risk infection by bandaging with material not known to be sterile (664, 694).

The train crew did the only things they should have done. Of first importance was to get appellant to a doctor, and then to a hospital. Proof of the wisdom of the course pursued is that appellant is alive. There is not a word of evidence that any injuries resulted from or were aggravated by what was done for him.

IV

OTHER MATTERS SUGGESTED

A. CLAIMED ERROR IN DENIAL OF THE MOTION TO PRODUCE.

Granting a motion to produce documents obtained by the adversary in preparation for trial is, at most, discretionary. Nothing has been suggested which would show an abuse of discretion here. This case had been fully tried once. Counsel for the plaintiff knew the defense he would meet. He had had ample opportunity to learn what, if any, proper documents existed. His demand was first made at the pre-trial conference. Full

objection was made that the foundation had not been laid; that there would be no objection to things which were normal matters of record, but objection would be made to an attempt to obtain the defendant's preparation. Plaintiff's attorney then stated that he was "not asking for anything which they obtained by means of investigation or otherwise" (262, 263). Defendant asked that he "designate for us with particularity" what was required "so I can identify them" (263). When, later, the motion was renewed, the documents claimed to exist were specified and identified by affidavit on "information and belief" only. **This was met by an affidavit that there were no such documents** (70). The Court found that this was true (85-93).

B. USE OF INTERROGATORIES.

Under old Rule 33 interrogatories, if used, were used against the party answering as admissions. The party answering could not use them on this basis. The rule was so obviously unfair that it was amended and is not in effect after March 19, 1948. The plaintiff attempted to take advantage of the old rule by picking and selecting among answers to a large number of interrogatories. He then objected when the defendant attempted to use other answers by the same person **upon the same subject,** which explained what was said in the answers used. The Court, quite properly, permitted this. Under Rule 43 evidence is admissible under a statute of the United States, any rule heretofore applied in the Courts of the United States, or any rule of the Courts of the State in which the trial is held. "In any case, the statute or rule

which favors the reception of the evidence governs." Cal. C. C. P. §1854 provides:

> "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole of the same subject may be inquired into by the other * * * and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence."

The only purpose the defendant had in offering other answers was that truncated and partial statements would not appear, to be argued to the jury, as the written statement of the witness to contradict his statement on the stand. The interrogatories read by the defendant did no more than cover what the witnesses had testified to. Under Rule 61 they could not be ground for reversal even if errors.

But there was no error. The court carefully limited the defendant to reading such answers as fell within the California Code Section. Appellant could not have picked a better example than Interrogatory No. 38. That had to do with the conductor's conduct when plaintiff went out the window. It asked whether the conductor grabbed plaintiff's coat. Physically and logically it fell between interrogatories and answers read by appellant, touching Cosgrove's conduct. These were 36, 39 and 41 which asked whether the conductor did anything to guard the plaintiff before he went through the window and whether the conductor gave an emergency stop signal after he saw plaintiff through the window and when the stop signal was given (602, 603). It certainly was proper to read an intervening interrogatory which showed that between the time plaintiff first

went through the window and the time the conductor gave a stop signal he was trying to hold the plaintiff. (*Reeves v. Ballow,* 16 C.2d 95, 104 P.2d 1017; *Hinton v. Welch,* 179 Cal. 463, 177 D. 282; *Davis v. Forrest,* Fed. Cas. No. 3634; *Wright v. Bragg,* 96 Fed. 729, 733 (C.C.A. 7); *Crawford v. U.S.,* 212 U.S. 183, 198, 53 L.ed. 465, 472.)

C. REFUSAL TO PERMIT PHOTOGRAPHS OR VIEWS OF PLAINTIFF'S INJURIES.

Appellant's Brief recognizes that the verdict having been for the defendant on the merits refusing to permit the jury to view plaintiff's injuries or to see pictures of them was not prejudicial (p. 60). Nor was the ruling error. It was a matter for the Court's discretion. (C.C.P. §1954; *Leonard v. Hume,* 5 C.A.2d 41, 41 Pac.2d 965; *People v. Mead,* 47 C.A.2d 91, 117 Pac.2d 424.) Indeed, it has been held error to admit such evidence where, as here, the injuries were not disputed (*Dean v. Seenan,* 42 S. D. 577, 176 N.W. 649).

D. CLAIMED ERROR IN THE CHARGE.

The argument of error in the charge shows a number of misconceptions: It overlooks the rule that we were entitled to have instructions given on our theory of the facts. (*Thomas v. Visalia etc. Co.,* 169 Cal. 658, 661, 147 P. 972; *Richey v. Watson,* 204 Cal. 387, 268 P. 345.) We and the jury were not bound by plaintiff's theory. His testimony was open to grave question and was contradicted. The jury was not required to believe he had hallucinations. Secondly, the argument forgets that there can be various degrees of not being in one's "normal mind". All deviations do not result in helplessness. Thirdly, the jury could

find various degrees of notice to defendant varying from notice that he was normal, to notice of fear of non-existent threats. Fourth, if there were notice of deviation from normal what to do was a matter of judgment. It is confessed that if plaintiff's conduct is not excused because he could not control it, he clearly was guilty of negligence (see p. 62). Finally, the argument does what the jury was told not to do (963),—it selects a part only of the charge and argues error by wrenching instructions from their context.

At page 61 it is argued that it was error to instruct that if plaintiff was not helpless and incapable of caring for himself, knew where he was, and appreciated his surroundings, he was under a duty to exercise reasonable care and was not relieved of this because he was not in his "normal" mind; that if he were guilty of contributory negligence he would not be relieved of its effects by drunkenness or the effects of excessive drinking.[25] It is said that this puts limits to the conditions under which a demented passenger's failure to use care will not bar recovery. There are such limits, in law and in fact. They depend upon the degree of deviation from normal. Thiel was capable of using some care. The jury was instructed that a person not mentally normal is not held to the degree of care of the ordinary reasonable man, but only to such a degree of care as he can exercise (975:13-16). This was more favorable than appellant was entitled to. The instruction complained of must be read with what immediately follows (996:7-15). It told the jury that if he could not

25. This does not say intoxication is contributory negligence (it may be—see App. E of our brief in No. 10681) but that if he could exercise care but did not drinking or its effects won't excuse this.

protect himself or appreciate danger to himself, and this were known to us, negligence could not be charged to him and that the defendant, if it knew or should have known his condition, was bound to exercise care commensurate with his ability to guard himself, and to give such care and protection as his condition required commensurate with his ability to guard himself (973:13-974:2).

Appellant's real difficulty is in thinking that the court should have instructed **as matter of law** that plaintiff was **not** guilty of contributory negligence. This was for the jury, and it was proper to deny instructions which would have taken it from the jury. So plaintiff complains of refusal of his request No. 24. This would have told the jury that if he were deranged (in any degree, however slight), and the railroad failed to exercise the highest degree of care (without limiting this to time or claim of negligence[26]) contributory negligence[27] could not be invoked. This is not the rule. Complaint is made of refusal of request No. 35A, that if plaintiff had hallucinations and the defendant knew or in the exercise of reasonable care should have known (this goes beyond the cases, —see p. 58 above) and failed to exercise care, contributory negligence was not available. According to this, if Forsyth failed to exercise care on Sunday morning, plaintiff's later contributory negligence would not be a defense. It must be remembered that the jury was instructed that it was enough to find that defendant was guilty of any **one** act of negligence (971:19-24), and that

26. This degree of care was certainly not that owed as to first aid. If any care was owed it was only ordinary care.

27. Which could be found only if he were capable of exercising some care.

if there were no negligence in accepting plaintiff as a passenger, but the conductor or brakeman failed to act after plaintiff was out the window, the defendant was "negligent **and liable to plaintiff**"[28] (971:25-972:11). The court instructed on last clear chance (977:20, et seq.) and specifically applied this doctrine to Sorenson (975:17-976:2), Cosgrove and Sherman (971:25-972:19).

At one with this is complaint (p. 65) of the standard definition of contributory negligence and its effect. It was a complete defense to antecedent or concurrent negligence of the defendant, if any. Subsequent negligence, if any, was covered by the last clear chance instruction.

It is argued (p. 62) that it was error to instruct that payment of Sorenson's salary by defendant "**without more**" and "if there is **no other** proof" did not make him defendant's agent; that he was defendant's agent as matter of law. The instruction was correct (see Appendix E). It was another way of stating that a commissioned police officer is presumed to be acting in his official capacity (see note 19 at p. 60 above). It must be read with that which said that the mere fact that he was commissioned did not preclude his being our agent and that payment of his salary was "some evidence" that he was our agent (977:8-14). Other instructions told the jury that he might be an agent of the defendant and that if he were and were negligent his negligence was defendant's (975:17 et seq.; 991:5). The instructions were more favorable to plaintiff than he was entitled to, for they said that if defendant had a **right** to direct and control his activity he was its

28. As to this there was no qualification for plaintiff's negligence—a verdict was instructed.

agent (977:14-19). This is wrong. We might have the right to direct him in some things but if, at the moment, were not and he was acting as a police officer under his commission remote right to direct would not make him our agent (see Appendix E). If mere payment of salary made Sorenson our agent at all times and in all things the cases in Appendix E and note 19, page 59 above, are wrong, for in all the policeman was paid by the party sought to be charged.

It is argued (p. 63) that it was error to instruct that if plaintiff was not capable of caring for himself but was accompanied "by an attendant who was **competent** to **adequately** care for him" defendant need not provide another guard etc. The objection stated (1006:12) was not adequate and did not suggest the points now raised. The argument ignores the fact that the instruction applied only where there was an attendant "**competent** to **adequately** care for" plaintiff. The charge did not overlook that defendant was always under a duty to exercise the highest care. The jury was fully instructed on this (972:25-975:12; 974:6-17; 973:13-974:5; 974:21-975:1). The argument ignores what immediately followed stating that the carrier need not voluntarily offer assistance where the **reasonable anticipation is that assistance from the railroad is unnecessary** but that if special care is promised and the promise is not fulfilled the defendant is not excused because the plaintiff was accompanied (990:20-991:15). Indeed, had the instructions stood alone, it was correct (see cases at page 61 above).

It is argued (p. 64) that if the defendant had constructive knowledge of mental incapacity (degree not

specified) it was required to give special care and that it was error to instruct that there was no increased duty in the absence of actual knowledge **or notice.** The instruction was correct (see cases p. 58 above). It would have been correct if it had turned on knowledge alone. If the plaintiff wanted notice defined he should have requested instructions. Indeed, he did. The instructions were given. The jury was told that if plaintiff were suffering from use of alcohol or mentally ill (degree not stated) and defendant knew "or in the exercise of reasonable care should know" his condition it had to use commensurate care (973:13-974:2); that if defendant "had reasonable notice that plaintiff was mentally ill" it was under a duty to make reasonable inquiry and if it did not it "did not exercise the utmost care and diligence to guard him" (975:2-12). These instructions were much more favorable than necessary. (See cases p. 58 above.)

It is argued (p. 66) that it was error to instruct that if Morris and plaintiff's wife were his agents to look after him their negligence, if any, was his. The instruction was correct. Elsewhere the jury was told that mere concurring negligence of some third person with defendant's was not a defense (976:3-12). There was ample evidence that he had committed himself to the care of his wife and Morris. Direct evidence was not necessary. He says he was present when Morris talked to the ticket seller and the police officer for he testified to the conversation. So he heard Morris say that he had come up to take Thiel home; that in some circumstances he would not be responsible for Thiel (439, 440, 442, 595). He turned the railroad tickets over to Morris and asked him to take care of them (453, 558). Morris, in the smoker, told the conductor that he had

to keep his eye on Thiel (1088). In each instance he acquiesced. That he was looking to his wife to care for him was implicit in his statement that "I don't think she would go without me and leave we there" (538:13). But more important is the whole course of conduct, not only in the station but before arrival there and at the police station where the detective sergeant did not detain Thiel for the expressed reason that he was accompanied by two normal adults (1033). It is evident throughout the whole record that Thiel had committed himself to the care of his wife and Morris. Not once did he remonstrate in any of the instances in which he heard statements that care of him had been assumed, nor when it was assumed. Of course, it is not necessary to have a commercial transaction to have an agency (1 Restatement, Agency, §§1, 15, 16, 26). Appellant quotes a case for the proposition that it is presumed a person acts for himself and not for another. But facts overcome the presumption. In undertaking to care for the plaintiff neither his wife nor Morris was acting for himself but for Thiel, and he acquiesced. (Cf. *Johnson v. Gulf etc. Co.,* 2 Tex. Civ. App. 139, 21 S.W. 274, 276, holding noted in *Hines v. Welch,* 229 S.W. 681, 683 (Tex. C.A.); *N. Y. etc. Co. v. Kistler,* 66 Oh. St. 326, 64 N.E. 130, 135.)

The plaintiff complains (p. 67) because the court instructed that the jury was not to draw any inference unfavorable to witnesses or defendant because statements or reports had not been offered by the defendant or received in evidence. The argument overlooks the background and meaning of the instruction. The plaintiff had moved that the defendant be ordered to produce specified reports. The court denied the motion and found

there were no such reports as specified. On cross-examination it developed that statements, undescribed and unidentified as to content had been taken. These were not requested. The only ones referred to were those of people who testified and were cross-examined fully. Then, on argument, utterly without foundation, by using this cross-examination as an excuse, the attorney for plaintiff was guilty of the grossest misconduct in accusing the witnesses and counsel for the defendant of perjury and subordination of perjury (1189-1192). The instruction was given because of this intemperate language. The objection to the instruction was that it dealt with failure to offer the statements in evidence and "there has been **no contention * * * that its statements should have been offered** in evidence or were properly admissible"; that the contention was that the statements should have been shown to the witnesses. The objection recognized that the instruction said that the jury might consider that reports were made and had not been shown to the witnesses (1009, 1010). The very objection answers the argument. There is no room to complain of suppression of evidence by the defendant when the evidence would not have been admissible.[29] The instruction says nothing about producing reports or use of them by the plaintiff and had nothing to do with cross-examination or impeachment.

Complaint is made (p. 70) because instructions on the California First Aid Kit Law were refused. The accident happened in Nevada and the California statute had no application (see p. 66 above). The instructions as proposed

29. They could not have been used even to refresh recollection because no refreshing was needed.

would have made the statute apply without regard for time or place; would have permitted the jury to find that a California statute was violated by conduct in Nevada. They ignored §4 of the statute.[30] There was no attempt to show any of the conditions necessary to show violation of the statute.[31]

CONCLUSION

It is respectfully submitted that there was no error. The jury panel was properly constructed. Any objection to it was waived. The case was fairly tried and the jury was fully and fairly instructed,—indeed, the instructions resolved every doubtful question of law in favor of the plaintiff and were more favorable to him than the court was required to give.

It is submitted that the judgment must be affirmed.

Dated at San Francisco, California, April 5, 1948.

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(Appendices Follow)

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30. Allows the railroad "not to exceed three days" in which "to replace any package or packages after the use of same has been reported by the employees in charge of said train or steam engine."

31. See note 30 just above.

Moreover, there was no evidence to show that want of a first-aid kit had any causal relation to any injury claimed. The statutory kit was one of bandages only. Bandages have no medicinal properties. They could only serve to keep out further infection and there is no evidence any further infection was or could have been introduced.

Appendix A

INDEX TO RECORD

Appendix B

STATUTES DEALING WITH SELECTION OF FEDERAL PETIT JURIES

FEDERAL STATUTES.[1]

Judicial Code, §275, 28 U.S.C.A. §411.[2] (R.S. §800; June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §275, 36 Stat. 1164.) **Jurors; qualifications and exceptions.** Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications,[3] subject to the provisions hereinafter contained, and be entitled to the same exemptions,[3] as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

Judicial Code, §276, 28 U.S.C.A. §412.[4] (June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §276, 36 Stat.

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1. We use the wording of the United States Code.

2. This section, with §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44), Judicial Code, §278, 28 U.S.C.A. §415 and Judicial Code §286, 28 U.S.C.A. §423 are the only Federal statutes dealing directly with general qualifications and exemptions of jurors. No Federal statute restricts the power of judges of Federal courts to excuse qualified and non-exempt jurors, in the exercise of their discretion, on a showing personal to the juror not amounting to an exemption. 50 U.S.C.A. §57 deals with employees of U.S. arsenals.

3. The California statutes are set out below.

Only "qualifications" and "exemptions" are determined by state law. "In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and impaneling of jurors in the state courts applicable to the courts of the United States" except as the statutes of the United States, before 1911, permitted adoption of state practice by rule or order. (*Pointer v. United States,* infra note 4, and note 4; *Ballard v. U. S.,* 329 U.S. 187, 91 L.ed. (Adv. Op.) 195, 197.)

4. The method of obtaining the names has not always been the same. Under R.S. §800 the Federal courts could "by rule or order,

1164; Feb. 3, 1917, c. 27, 39 Stat. 873.) **Same; manner of drawing.** All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political

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conform the designation and impanelling of juries, in substance, to the laws and usages relating to jurors in the State courts." Under the Act of 1879 any judge could order "the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors." (See *Pointer v. United States,* 151 U.S. 396, 406, 38 L.ed. 208, 213 (1894); *Thompson and Merriam, Juries* (1882), §48 et seq.) But even under these provisions the state practice was not followed in the absence of a rule or order of court. "Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. In the absence of such rule or order * * * the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed." (*Pointer v. United States,* supra, quoted in *St. Clair v. United States,* 154 U.S. 134, 147, 38 L.ed. 936, 941 (1894); *Apgar v. United States,* 255 F. 16, 18 (C.C.A. 5, 1919,—cert. den. 250 U.S. 642, 63 L.ed. 1185).)

The provisions permitting use of the state practice, or names from the state boxes, were removed in 1911. Since then the only method of getting names has been that of the designated Federal court officials placing names in a Federal jury box. The Federal court officials designated in the statute can not delegate their functions. (*Glasser v. United States,* 315 U.S. 60, 85, 86 L.ed. 680, 707 (1942); *Dunn v. United States,* 238 F. 506 (C.C.A. 5,—1917 —holding that before the 1917 amendment the Clerk's deputy could not act for the Clerk).)

party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately without reference to party affiliations[5] until the whole number required shall be placed therein.

Judicial Code, §277, 28 U.S.C.A. §413. (R.S. §802; Mar. 3, 1911, c. 231, §277, 36 Stat. 1164.) **Same; apportioned in district.** Jurors shall be returned from such parts of the district,[6] from time to time, as the court shall direct, so as

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5. This reference to political affiliations was introduced by the statute of 1879. This is the first mention in a Federal statute or Federal decision, of party affiliations as a matter for consideration in the selection of names for jury lists.

6. It has been held, repeatedly, that names need not be returned from the whole district. To the contrary, the court may direct that jurors be returned from a part of the district only, under the plain wording of the statute. A jury drawn from names of persons residing in a part only of the district is not subject to challenge on that account. The court can "draw and summon jurors from the entire district" but "it was not necessary, however, that this be done." (*Lewis v. United States,* 279 U.S. 63, 72, 73 L.ed. 615, 619 (1929). Acc., *Agnew v. United States,* 165 U.S. 36, 42, 41 L.ed. 624, 626 (1897); *Ruthenberg v. United States,* 245 U.S. 480, 482, 62 L.ed. 414, 418 (1918); *Jarl v. United States,* 19 F.2d 891, 894, 895 (C.C.A. 8,—1927—citing earlier cases); *Frantz v. United States,* 62 F.2d 737, 738 (C.C.A. 6,—1933—following the *Jarl Case* and citing the *Lewis* and *Ruthenberg Cases*); *Needham v. United States,* 73 F.2d 1, 2 (C.C.A. 7,—1934—cert. den. 294 U.S. 705, 79 L.ed. 1241); *Walker v. United States,* 93 F.2d 383, 392 (C.C.A. 8,—1937—cert. den. 303 U.S. 644, 82 L.ed. 1124); *Seadlund v. United States,* 97 F.2d 742, 747 (C.C.A. 7,—1938); *Walker v. United States,* 116 F.2d 458, 462 (C.C.A. 9,—1940).)

In the *Ruthenberg* and *Seadlund Cases* it was held that the 6th Amendment does not require that the jury be drawn from the whole district and Judicial Code §277 is referred to as indicating that the practice has been otherwise. The *Ruthenberg Cases*, answering the argument that the jurors were not drawn from the entire district, said: "The proposition disregards the plain text of the 6th Amendment, the contemporary construction placed

to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

28 U.S.C.A. §414 deals with juries in the District of Indiana.

8 U.S.C.A. §44.[7] **(Mar. 1, 1875, c. 114, §4, 18 Stat. 336.) Exclusion of jurors on account of race or color.** No citizen

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upon it by the Judiciary Act of 1789 (Chap. 20, 1 Stat. at L. 73, 88, §29) expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. §802, Rev. Stat. §277, Judicial Code [36 Stat. at L. 1164, Chap. 231 Comp. Stat. 1916, §1254]. (Citing earlier cases.)''

7. This is the first Federal statute to deal in terms with exclusion from jury service of any class of person. It was one of the statutes adopted as part of the Congressional scheme of ''reconstruction'' after the war between the States. It was part of the attempt to secure to the negroes enjoyment of recently acquired civil rights.

On Dec. 18, 1865 the Secretary of State proclaimed the adoption of Amendment XIII. Two companion measures were then introduced in Congress, the Freedman's Bureau Bill and the Civil Rights Bill of April 9, 1866, c. 31, 14 Stat. 27 (see 8 U.S.C.A. §41. For the later history of §2 of the Act (now Crim. Cod. §20, 18 U.S.C. §52) see *Screws v. U. S.*, 325 U.S. 91, 89 L.ed. 1495). The Civil Rights Bill did not in terms refer to jurors. It did secure to all ''the same right * * * to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens.'' In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.ed. 664, (1880) a statute confining jurors to ''white males'' was held to violate Amendment XIV. As part of its argument the opinion quotes the provisions of the Act of 1866 and says they ''partially enumerate the rights and immunities intended to be guaranteed by the Constitution.'' The clear implication is that the Act was broad enough to strike at discrimination for race or color in selecting names for jury lists. But that case was not decided until 1880.

There were grave doubts as to the constitutionality of the Act of 1866,—whether it was sustained by Amendment XIII. (The question was argued in *Blyew v. United States*, 13 Wall. 581, 20 L.ed. 638, 1872) but the court found it unnecessary to pass on the question.) One of the purposes of Amendment XIV was to remove these doubts. (See *Civil Rights Cases*, 109 U.S. 3, 22, 27 L.ed. 835, 843 (1883); Mr. Justice Field, dissenting in *Ex parte*

possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000.00.

Virginia, 100 U.S. 339, L.ed. 676 (1880), and in *San Mateo v. So. Pac. R. Co.,* 13 F. 145, 149 (1882); *Flack, Adoption of the Fourteenth Amendment,* esp. at 40; *Swisher, American Constitutional Development,* 312-316; *McLaughlin, A Constitutional History of the United States,* stud. ed., 653.) Amendment XIV was proclaimed by the Secretary of State on July 28, 1868. The first acts for the enforcement of Amendments XIV and XV were adopted in 1870 and the Civil Rights Bill of April 9, 1866 was "re-enacted with some modifications in sections 16, 17, 18 of the Enforcement Act passed May 31, 1870" c. 114, 16 Stat. 144. (*Civil Rights Cases,* 109 U.S. at 16, 27 L.ed. at 841; *San Mateo v. So. Pac. R. Co.,* supra at 151.)

Charles Sumner was insisting that a supplementary civil rights bill be adopted and on May 13, 1870 introduced a bill which became the Civil Rights Act of Mar. 1, 1875 (*Storey, Charles Sumner* (30 Am. Statesmen Series), 401 et seq.; *Flack, op. cit.,* 218). See Report of Attorney General (1873), p. 17.

The Act of Mar. 1, 1875 was the "culmination of the efforts of Congress to enact laws for the enforcement of the Fourteenth Amendment." (*Flack, op. cit.,* 277) "With this the record of partisan legislation on reconstruction was closed." (*Dunning, Reconstruction* (22 Am. Nation Series), 255.) Section 4 of that act is the statute here set out and is now 8 U.S.C.A. §44. *This is the first Federal Statute to deal in express terms with discrimination in selecting names for jurors.* (It was anticipated in Tennessee in 1868 and in Louisiana in 1870. *Proffatt, Jury Trial,* §116 at p. 163.)

Section 4 of the Act of Mar. 1, 1875, was sustained, as applied to state officers, in *Ex parte Virginia,* 100 U.S. 339, 25 L.ed. 676 (1880). (And see *Neal v. Delaware,* 103 U.S. 370, 385, 26 L.ed. 567, 570 (1881); *Civil Rights Cases,* 109 U.S. 3, 16, 27 L.ed. 835, 841 (1883); *Gibson v. Mississippi,* 162 U.S. 565, 580, 40 L.ed. 1075, 1078 (1896).) But in 1883 §§ 1 and 2 of the Civil Rights Act of Mar. 1, 1875 were held to be beyond the power of Congress (*Civil Rights Cases,* 109 U.S. 3, 27 L.ed. 567 anticipated in

Judicial Code, §278, 28 U.S.C.A. §415.[8](June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §278, 36 Stat. 1165.) **Same; not disqualified because of race or color.** No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous conditions of servitude.

Judicial Code, §297, 28 U.S.C.A. §416 deals with the issuance and service of writs of venire facias to bring persons into court to serve as jurors.

Judicial Code, §280, 28 U.S.C.A. §417 deals with returning of "jurymen from the bystanders" where the panel is exhausted without obtaining a jury.

28 U.S.C.A. §417a empowers the court to select alternate jurors. This is not required, but is committed to the court's discretion. This section also provides how such jurors shall be impaneled. Compare Fed. Rules of Civ. Pro., Rule 47(b).

Judicial Code, §§282-285, 28 U.S.C.A. §§419-422 deal with grand jurors.

Judicial Code, §286, 28 U.S.C.A. §423. (R.S. §812; June

United States v. Harris, 106 U.S. 629, 27 L.ed. 290 (1883)). This left §4 as the only substantive provision of the Act of Mar. 1, 1875. It now stands alone, torn from its original context. It is easy to forget its background and real purpose. It was part of the Congressional scheme of "reconstruction"; part of an attempt to solve the negro problem. This was its orientation. The primary objective was the problem of the colored citizen rather than the jury system generally.

8. This is only a re-enactment in 1879 of §4 of the Act of Mar. 1, 1875, restricted in application to the Federal courts. Whatever doubts there may have been as to the validity of §4 of the Act of Mar. 1, 1875, until it was sustained in 1880 (see note 7 above), there could be no doubt about a statute restricted in application to the courts of the United States.

30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §286, 36 Stat. 1166.) **Jurors not to serve more than once a year.** No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.

Judicial Code, §287, 28 U.S.C.A. §424. (R.S. §819; Mar. 3, 1911, c. 231, §287, 36 Stat. 1166.) **Challenges.** When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court[9] without the aid of triers.

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9. Appellate courts will give the same deference to the determination of a fact by the trier of facts upon a challenge to the array or to individual jurors, as to any other determination of fact by the court to which that function is committed. (*Akins v. Texas,* 325 U.S. 398, 89 L.ed. 1692, 65 Supp. Ct. Rep. 1279 (1945); *Pierre v. Louisiana,* 306 U.S. 354, 358, 83 L.ed. 757, 760 (1939); *Thomas v, Texas,* 212 U.S. 278, 281, 53 L.ed. 512, 513 (1909); *Gibson v. Mississippi,* 162 U.S. 565, 584, 40 L.ed. 1075, 1079 (1896); *Wood v. Brush,* 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891); *Ex parte Spies,* 123 U.S. 131, 179, 31 L.ed. 80, 90 (1887); *Reynolds v. United States,* 98 U.S. 145, 156, 25 L.ed. 244, 247 (1879); *Press Pub. Co. v. McDonald,* 73 F. 440 (C.C.A. 2,—1896—cert. den. 163 U.S. 700, 41 L.ed. 320); *Robinson v. United States,* 144 F.2d 392, 398 (C.C.A. 6,—

28 U.S.C.A. §425 deals with peremptory challenges "in the trial of a capital offense."

Judicial Code, §288, 28 U.S.C.A. §426 deals with disqualification of jurymen and talesmen "in any prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States."

CALIFORNIA STATUTES—CODE OF CIVIL PROCEDURE.

§198. **Persons competent to act as jurors.** A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language.[10]

§199. **Who not competent to act as juror.** A person is not competent to act as a juror;

1. *Who does not possess the qualifications* prescribed by the preceding section;

1944—aff'd on certiorari limited to another question, 324 U.S. 282, 89 L.ed. (Adv. Op.) 635 (1945). The determination of the trial court will not be disturbed unless an abuse of discretion is shown. (*Green v. United States,* 19 F.2d 850 (C.C.A. 9,—1927—aff'd on certiorari limited to question of wire tapping, 277 U.S. 438, 72 L.ed. 944); *Robinson v. United States,* supra.) And see *Fay v. New York,* 332 U.S. 261, 91 L.ed. (Adv. Op.) 1517.

The practice in state courts is the same. (*Herndon v. State,* 178 Ga. 832, 174 S.E. 597, 601 (1934) app. dis, 295 U.S. 441, 79 L.ed. 1530 (1935); *State v. Walls,* 211 N.C. 487, 191 S.E. 232, 237 (1937) app. dis. and cert. den. 302 U.S. 635, 82 L.ed. 494 (1937); *State v. Henderson,* 216 N.C. 99, 3 S.E.2d 357, 361 (1939).)

10. A requirement that the person be "assessed on the last assessment-roll * * * on property belonging to him" was in this section until 1915.

2. *Who has been convicted of malfeasance* in office or any felony or other high crime; or

3. *Who has been discharged as a juror* by any court of record in this state within a year, as provided in section 200 of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged; or who, in a county or city and county containing a population of not less than three hundred thousand as ascertained by the last preceding census taken under the authority of the congress of the United States, or the legislature of the state of California, during the preceding two years shall have actually served on twenty days as a trial juror in the trial of cases in a court of record in this state; but a juror must in any event complete his service as such juror in the trial of a case in which he may be actually engaged. The clerk shall immediately remove from the jury list the name of any juror who becomes disqualified under this section.

4. *A person who is serving as a grand juror in any court of record* in this state is not competent to act as a trial juror in any such court. Any person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court.

§200. **Exemptions From Jury Service.** A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, naval or military officer of the United States, or of this State while on active duty;

2. A person holding a county, city and county, city, town or township office of profit;

3. An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;

5. A teacher in a university, college, academy or school;

6. A practicing physician, or practicing licensed dentist, practicing chiropodist, or practicing registered optometrist, or druggist, actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the State prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this State;

10. An express agent, mail carrier, or a superintendent, employee, or operator of a telegraph or telephone company, doing a general telegraph or telephone business in this State, or keeper of a public ferry or tollgate;

11. An active member of the National Guard of California,[11] or an active member of a paid fire department of any city and county, city, town or village in this State,[12] or any exempt member[13] of a duly authorized fire company.

12. A superintendent, engineer, fireman, brakeman, motorman, or conductor on a railroad;

13. A person drawn as a juror in any court of record in this State, upon a regular panel, who has served as such within a year, or a person drawn or summoned as a juror

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11. Compare Cal. Mil. and Vet. Cod., §391.

12. Cal. Health and Safety Cod., §14855 also exempts "officers and members of unpaid fire companies regularly organized and exempt firemen."

13. "Every fireman who has served five years in an organized fire company in this State is an 'exempt fireman'." Cal. Health and Safety Cod., §14856.

in any such court, who has been discharged as a juror within a year as hereinafter provided; or a person who is incompetent under Subdivision 3 of the preceding section; provided, however, that in counties having less than 5,000 population the exemption provided by this subdivision shall not apply; or,

14. A practitioner who treats the sick by prayer in the practice of the religion of any well recognized church or denomination, or a reader whose duty is to conduct regular religious services of such church or denomination.

§205. **Selection and listing of jurors.** The selections and listings shall be made of persons[14] suitable and competent to serve as jurors, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm, or decrepit, of fair character and approved integrity, and of sound judgment.

§602. **Challenges of jurors for cause; Grounds of challenge.** Challenges for cause may be taken on one or more of the following grounds:

1. *A want of any of the qualifications prescribed* by this code to render a person competent as a juror;

2. *Consanguinity or affinity within the fourth degree* to any party or to an officer of a corporation which is a party;

3. *Standing in the relation of guardian and ward, master and servant,* employer and clerk, or principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation

14. Until 1915 the names were to be taken from "those assessed on the last preceding assessment-roll."

for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party, or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party.

4. *Having served as a juror in a civil action or been a witness* on a previous trial between the same parties, for the same cause of action; or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant.

5. *Interest on the part of the juror* in the event of the action, or in the main question involved in the action, except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

6. *Having an unqualified opinion or belief* as to the merits of the action founded upon knowledge of its material facts or of some of them.

7. *The existence of a state of mind* in the juror evincing enmity against or bias to either party.

8. *That he is a party to an action pending* in the court for which he is drawn and which action is set for trial before the panel of which he is a member.

CONSTITUTION OF CALIFORNIA.

Art. I §4. "* * * and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; * * *."

Art. XX §11. "Laws shall be made to exclude from office, serving on juries, and from right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office or other high crimes. * * *"

Appendix C

In the United States District Court, in and for the Northern District of California, Southern Division.

Gilbert E. Thiel, Plaintiff, vs. Southern Pacific Co., a corp., Defendant.	No. 21,780

OPINION AND ORDER ON MOTION TO STRIKE OUT ENTIRE JURY PANEL, ETC.

Plaintiff has filed herein a notice of motion for an order: "(a) Striking out or quashing the entire jury panel for the 'July Term, 1946', which is to be used for trial of this action, now set for September 10, 1946; (b) Directing the Clerk and Jury Commissioner of this Court to select a new panel which will be a fair, democratic cross-section of the community without discrimination in favor or against any one group or class of citizens because of their wealth, occupation, sex or race; and (c) Directing the 'parts of the district' of this Court from which 'jurors shall be returned' 'so as to be most favorable to an impartial trial'."

In support of the motion, movant filed a purported affidavit of Attorney Allen Spivock. This affidavit was not offered or received in evidence. In all events the plaintiff can rely only on the showing made by the evidence ore tenus. It is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion;

the formal affidavit alone, even though uncontroverted, is not enough. *Glasser v. United States,* 315 U.S. 60, 87; 86 L. Ed. 680, 708.

Before taking up the several asserted grounds in support of the motion, and in order to appreciate this more recent attack upon the jury system in this court, the history of the litigation should be given:

On December 30, 1940, plaintiff brought an action against the defendant, Southern Pacific Company, for damages in the sum of $250,000.00 for injuries resulting from a leap from a train. The complaint in substance and effect alleged that plaintiff was "out of his normal mind" on February 25, 1940; that, before accepting plaintiff as a passenger, defendant was informed that he was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded; that defendant, Southern Pacific Company, nevertheless accepted plaintiff as a passenger, left him unguarded and when he leaped failed to stop the train before he fell to the ground; that defendant's conduct constituted alleged negligence and caused plaintiff's alleged injuries.

The action was originally instituted in the Superior Court of the State of California, in and for the City and County of San Francisco. On petition of the defendant it was removed from that court to the District Court of the United States for the Northern District of California. The defendant answered, and in substance and effect denied that plaintiff was "out of his normal mind;" denied that said defendant was informed that plaintiff was "out of his normal mind" and therefore should not be accepted as a passenger, or else should be guarded; and denied that defendant was guilty of any negligence, and affirmatively

alleged that plaintiff's injuries were caused by his own negligence; as a separate defense it was alleged that his injuries were attributable to his own negligence.

Plaintiff filed a written demand for a jury trial in the District Court, and thereafter moved said Court to remand the action to the Superior Court. The motion was denied. Thereafter, disregarding the refusal to remand, plaintiff attempted to prosecute the action in the said Superior Court. Defendant applied for, and after a hearing, obtained from the District Court a judgment enjoining such prosecution. The judgment was affirmed. 126 F.(2d) 710. Certiorari to review the decision was thereafter denied. 316 U.S. 698; 62 S. Ct. 1295.

The action was thereafter assigned to trial in the District Court. A panel of prospective jurors was drawn, and the jury was thereupon and thereafter impaneled. On November 5, 1942, plaintiff challenged the array—the panel of prospective jurors drawn as aforesaid. The challenge was overruled. Thereafter plaintiff amended his complaint alleging in substance and in effect that defendant was negligent in failing to give him first aid treatment and medical attention at the scene. These allegations were denied.

Thereafter plaintiff moved the Court to strike his demand for a jury trial. The motion was denied.

Trial of the action was commenced on November 24, 1942. After the jury was impaneled and sworn plaintiff challenged the twelve jurors comprising it. The challenge was overruled and the trial proceeded. At the close of the evidence plaintiff moved the Court for a directed verdict; the motion was denied. The jury thereafter returned a verdict for the defendant, Southern Pacific Company. Plaintiff thereafter moved for a new trial, and also moved

to take depositions; both of said motions were denied. Judgment was entered for the defendant.

Plaintiff prosecuted his appeal. *Thiel v. Southern Pacific Company,* 149 F.(2d) 783, (Circuit Court of Appeals, Ninth Circuit) and therein specified as error the overruling of his challenge to the array. The challenge was based in substance and effect on practically, if not all, the same grounds urged in the motion before this Court. The judgment was affirmed in its entirety.

On certiorari review was had before the Supreme Court of the United States *"limited to the question of whether petitioner's motion to strike the jury panel was properly denied." Thiel v. Southern Pacific Co.,* 66 S. Ct. 472, 66 S. Ct. 984, 985.

The Supreme Court, speaking through Mr. Justice Murphy, held, in effect, that the intentional exclusion of *daily wage earners* from the jury list required the reversal, regardless of whether the plaintiff was prejudiced by the wrongful exclusion or whether he was one of the excluded class, even though the jury which actually decided the factual issues was found to contain at least five members of the laboring class.

Mr. Justice Frankfurter and Mr. Justice Reed, dissented. The Court said, in part:

> "It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of

$4 a day. All were systematically and automatically excluded." 66 S. Ct. 984, 987.

It was not claimed before the Supreme Court that the District Court Judges for the Northern District of California, with the approval of the Circuit Court Judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury panels, or that such unfair influence infused the selection of the panel, or was reflected in those who were chosen as jurors. Nor was there any suggestion that the method of selecting the jury was an innovation. The challenge went to a practice adopted in order to deal with the special hardship which jury service entailed for workers paid by the day. What was challenged, in short, was not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances. 66 S. Ct. 984, 988.

Several other grounds raised and presented by petitioner (plaintiff herein) were in substance and effect identical with those presently urged. They were given no mention in any of the Justices' opinions.

With that historical background of the case established, it is now proper to refer to the more recent events.

On Thursday, June 6, 1946, in the District Court of the United States for the Northern District of California, Southern Division, before Hon. Louis E. Goodman and Hon. Michael J. Roche, the matter of the selection of master trial and grand jury panels for July, 1946 Term of Court came on regularly to be heard at the hour of 4 o'clock P. M., in compliance with Section 276, as amended, of the Judicial Code (28 U.S.C.A. 412). At that

time the Court announced that it was deemed advisable to hold a session so that there could be a *public* drawing of the jurors.

The hearing was duly noticed in "The Recorder" of Thursday morning, June 6, 1946. The "Recorder" is a newspaper of general circulation and the official organ of the court. Carl W. Galbreath, Clerk of the Court, and William C. Mikulich, the Jury Commissioner, were called to testify with respect to the manner of drawing the jurors. The Clerk testified in substance: That he and the Jury Commissioner, collaborated in the selection of the names that were placed in the box; that the box contained 484 names; that the sources were three—the list of registered voters of the Counties of San Francisco, San Mateo, Alameda and Marin; the city directories of San Francisco and Oakland; and the telephone directories of other cities in the counties named. That he went to the Deputy Registrar of Voters of San Francisco and obtained a list for the year 1943, thence to the County Clerk in Oakland and obtained a complete list of the Alameda County registered voters down as far as Hayward for the year 1944; thence to Redwood City and obtained a list of registered voters for San Mateo County as far south as Redwood City and this side of the range of mountains; also that a list of the registered voters of Marin County was obtained; that approximately 50% of the names placed in the box were secured from the lists of registered voters; and that the remaining 50% were derived from the city directories of San Francisco and Oakland, and the telephone directories of cities in the other counties named.

After satisfying the Court that the sources of the names were such as "to be most favorable to an impartial trial,

and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service," (28 U.S.C.A. 413) Judge Louis E. Goodman then continued the interrogation of the Clerk.

"Q. How did you determine whether or not a person whose name was to be picked might be ineligible for jury duty under the provisions of the law?

A. I would have to depend on the description given in the directory or the list of the registered voters of the occupation of the person I selected.

Q. As between men and women did you use any method of procedure to secure any particular number of men as against women jurors?

A. I endeavored to obtain fifty per cent men and fifty per cent women.

Q. Did you leave out of the jury box the name of any juror whom you had selected because of any special occupation that he might have had aside from these occupations that are made exempt under the law?

A. No, I did not.

Q. Was any person left out because of color or race or creed or occupation?

A. They were not.

Q. What method did you follow in order to secure a cross section selection of jurors as regards occupation or status or color or the like?

A. I endeavored each time to select approximately half of the proposed jurors from the working class; by that I mean I made no distinction between those working for a daily wage as against those who worked for a weekly or monthly wage. That applies to women as well as men. The other fifty per cent that made up the list were made up of some of the executives or managers of firms or presidents or owners of busi-

ness; the colored population was taken into consideration; we put from 15 to 20 colored people in the jury box and also put the same number of Chinese into the jury box.

Q. Have you any way of knowing or did you keep any record as to the percentage of names deposited in the jury box that are residents of San Francisco as against the other counties in this district?

A. Yes, approximately one half of the names I selected are residents of San Francisco, one quarter are residents of Alameda County and one quarter are residents of the counties of Marin and San Mateo.

Q. Were there any names remaining in the box at the time that you deposited the names of the prospective jurors that you have referred to?

A. Yes; there was always an average of about one hundred such names remaining in the box when we filled it.

Q. So that when you filled the jury box this time you put in approximately 380 odd names; is that correct?

A. That is correct.

Q. And of those you put in approximately one half and Commissioner Mikolich put in the other half; is that correct?

A. That is correct.

Q. When you selected names in San Francisco from the list of registered voters did you follow any plan or method with respect to selecting jurors from different assembly districts?

A. I tried to pick a proportionate number of persons from each of the assembly districts in San Francisco.

Q. And did you make any use of the precinct lists?

A. I did. I took the precinct list from each assembly district, and, as I said, I started at the top and went down and found the name of a person that was not exempt and then I went on further and took another one, and then took another precinct list in the same district and did the same thing.

Q. After you had selected the names from the various sources that you have mentioned, did you make any check to see whether or not any of the names that you had picked was ineligible because of recent service as grand or petit jurors?

A. I did.

Q. Or those who had been previously excused because of physical condition or age?

A. I did. I checked the list with the names remaining in the box; with the names on the present trial and grand jury; with the names of persons who had served previously and been discharged, and then with those who had been excused previously on account of age, sickness or physical reasons.

Q. In placing the names in the box did you and the Jury Commissioner place them in alternately?

A. We did."

Thereafter the Jury Commissioner, Mr. Mikulich, was interrogated and stated in substance and effect that the procedure he adopted was identical in all respects with that of the Clerk.

The Court thereafter made the following finding:

"The court finds that the names of the four hundred and eighty four prospective jurors for the July, 1946, term of court, have been properly selected by the Clerk and the Jury Commissioner, as provided by Section 276 of the Judicial Code, as amended."

The testimony elicited from the Clerk has been set forth at some length for the reason that it demonstrates a careful compliance with the views of the Supreme Court in connection with the avoidance of any distinction *"between those working for a daily wage as against those who work for a weekly or monthly wage;"* and, in addition, is demonstrative that the Statutes, 28 U.S.C.A., Sec. 412, et seq. were fully complied with.

With that factual background established, the motion heard on August 19, 1946, before this Court may be analyzed: Plaintiff asserted the following grounds in substance: (1) That the majority of those selected for the jury were business men, etc., and that a small majority of those selected were working men; (2) that a large proportion of the men jurors were selected as compared with women jurors; (3) that no court orders or directions had been given to the Jury Commissioner or the Clerk of Court directing "the parts of the District from which the jurors shall be returned;" (4) that uniform rules were not made for the guidance of the Clerk and Commissioner in the drawing of the said jurors; (5) that no substantial changes in the method of selecting the jurors had been made and that the said decision of the Supreme Court had not been complied with; (6) that a large majority of the persons selected were prejudiced in favor of the defendant Company; (7) that the Jury Commissioner and said Clerk have endeavored to obtain jurors of the highest or superior intelligence and not those of "ordinary intelligence"; (8) that no system of lot or chance was used in selecting said jurors.

On the hearing of this motion the proceedings of June 6, 1946, referred to, were made a part of and read into the

record. Counsel for plaintiff claimed that he did not receive notice of said proceedings.

Notice was not necessary and the hearing was "public" within the contemplation of the statute. 28 U.S.C.A. 412; (Judicial Code, Section 276, amended) *Hammerschmidt v. U. S.,* 287 Fed. 817; *U. S. v. Lewis,* 192 Fed. 633.

The plaintiff then called the Clerk and also the Jury Commissioner, subjecting them to lengthy examination. In substantial particulars their testimony was in consonance with the former testimony on the proceedings of June 6, 1946.

It would seem unnecessary to dilate upon, or otherwise give particular attention to, the several grounds urged, for they are in the main unsubstantial and fully answered by the Federal Statutes applicable: 28 U.S.C.A. 411, 412, et seq.

It is evident from a reading of the transcript of the foregoing proceedings, and from the excerpt hereinabove set forth, that strict compliance was given to the decision, mandate and direction of the Supreme Court, i. e.—*that daily wage earners be included in the panel.*

However, I will discuss plaintiff's points, seriatim:

(1 and 2) Both the Clerk and the Jury Commissioner emphasized in their testimony that the daily wage earners had not been excluded. On the contrary appropriate provision was made for this group.

Mr. Mikulich, the Jury Commissioner, in interpreting the groups classified under business, as compared with labor, detailed that the former included those connected with business as department heads, clerks, salesmen and solicitors, and their wives. In short, the business group representing approximately 50% of the panel did not comprise all proprietors, managers and officials.

Mr. Calbreath, the Clerk of the Court, in his examination was very clear to point out that he sought to *equalize occupations.* Admittedly, he did not go to the San Francisco Chamber of Commerce for information, and this was not incumbent upon him. Plaintiff attempted in Exhibit No. 1 (Economic Survey, San Francisco Bay Area, 1945) to demonstrate that 11.14% of the population represented proprietors, managers and officials, and therefore it was argued that the total number of jurors drawn or "selected" from said group was disproportionate. Counsel for plaintiff has misconceived or misinterpreted the figures. According to the survey it appears: "San Francisco ranks high among large cities with nearly 55% of its entire resident population in the labor force." The other 45% necessarily represented proprietors, managers, officials, clerical, sales, kindred workers and others not identified with the laboring groups.

Although the Clerk and the Commissioner testified that this statistical data was not available to them when the names were selected for the panel, nevertheless the evidence demonstrates that the names as drawn by them represented an impartial panel from a cross-section of the community. The Clerk testified: *"I endeavored each time to select approximately half of the proposed jurors from the working class; by that I mean I made no distinction between those working for a daily wage as against those who worked for a weekly or monthly wage."*

Plaintiff is laboring under a serious misconception in declaring that "in the Superior Court of the State of California, whose jury qualifications control here, an equal percentage of men and women are now selected." Citing *Pointer v. United States,* 151 U.S. 396, 405-409, 14 S. Ct.

410, 38 L. Ed. 208; *United States v. Roemig,* 52 F. Supp. 857.

The *Pointer* case is not authority for the proposition that the United States District Courts are controlled by the procedure, rules or practices of the State courts. It is only in connection with the *qualifications* and *exemptions* of jurors to serve in the courts of the United States that the statutes of the State are at all applicable. The Court therein said:

> "There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. U. S. v. Shackleford, 18 How. 588; U. S. v. Richardson, 28 Fed. 61, 69. In the absence of such a rule or order (and no such rule or order appears to have been made by the court below), the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses." (151 U.S. 396, 14 S. Ct. 410 at 414.)

In *Albizu v. United States,* 88 Fed.(2d) 138, 140, the Court said:

> "As to the assignment of errors relating to the selection of the Jury, there is only one act of con-

gress relating to the drawing of jurors in the federal courts which requires that the persons who are summoned as jurors must be drawn publicly from a box containing at least 300 names. Other than this, unless a federal court shall, by order, adopt the state practice, the method of selection is within the control of the federal courts, subject to any limitation placed thereon by congress, or recognized by the settled principles of criminal law essential to securing an impartial jury. *Pointer v. United States,* 151 U.S. 396, 405-509, 14 S. Ct. 410, 38 L. Ed. 208."

The District Courts for the Northern District of California have not, by rule or order, adopted the State practice in this connection.

Reference is made by the moving party to *United States v. Roemig,* 52 F. Supp. 857. The specification of invalidity therein made was that women were intentionally and systematically excluded from membership on a grand jury. The Court, although acknowledging that "nothing in the Constitution or Statutes of the United States peremptorily requires the inclusion of women on jury lists in the federal courts or forbids their exclusion," granted the motion to quash the indictment after a review of the authorities including *dictum* in *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, and *contra, United States v. Ballard* (D.C.S.D. Cal.) 35 F. Supp. 105; affirmed 152 Fed. (2d) 941, (9th Circuit); certiorari granted 66 S. Ct. 816.

The rule announced in the *Roemig* case was simply to the effect that a grand jury on which women were systematically and intentionally prevented from serving by manner of selecting members was invalidly constituted.

There is no rule, statute or decision requiring that the jury list or panel be composed or constituted of 50% women and 50% men.

It appears from the testimony of both the Clerk and the Commissioner herein that they *"endeavored to obtain 50% men and 50% women."*

Many prospective women jurors after their names are drawn submit adequate reasons for their excusal by the District Judge, which necessarily involves an exercise of judicial discretion. This latter procedure obviously is not integrated with the drawing of the jurors in the first instance by the Clerk and the Commissioner. The fact that ultimately there were more men than women on the panel is immaterial.

(3) Ground 3 turns on the construction of Judicial Code, section 277 (28 U.S.C.A. 413). The statute is explicit. "Jurors shall be returned from such parts of the district * * * as the Court shall direct * * * so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the District."

It is contended that "no court orders or directions had been given to the Jury Commissioner or the Clerk directing the parts of the district from which the jurors shall be returned." The Judges were not required to prescribe such directions or orders and no apportionment was required. It is discretionary with the Court to give or not, at its pleasure, any direction as to the summoning a jury from a part of a district. The Court can "draw and summon jurors from the entire district" but "it was not necessary, however, that this be done." *Lewis v. United States,* 279 U.S. 63, 72, 73 L. Ed. 615, 619; *Agnew v. United States,* 165 U.S. 36, 42, 41 L. Ed. 624, 626; *Ruthenberg v. United States,* 245 U.S. 480, 482, 62 L. Ed. 414, 418.

Selection of jurors to sit in San Francisco was limited to those within convenient travel distance. It appeared

that it was the rule and practice of the court, going back to 1912, to restrict names put in the jury box to those of people who lived within commuting distance of the court, but within that area, there was no discrimination against any locality.

That practice was maintained and approved under the *direction* of the Court at the hearing "In re selection of Master Trial and Grand Jury Venire on June 6, 1946, for the July 1946 Term of Court," before District Judges Louis E. Goodman and Michael J. Roche.

(4) The Judges of the District Court were not required to prescribe rules for the guidance of the Clerk and Commissioner. Congress has promulgated the rules and the statutes are clear and explicit. 28 U.S.C.A., Sec. 411, 412, et seq. The machinery for putting names into a jury box which shall contain not less than 300 names from which the panel shall be drawn by lot, has been directly prescribed by Congress. The names are to be placed in a box by the Clerk of the District Court, and a Commissioner to be appointed by the Senior District Judge. 28 U.S.C.A., Sec. 412.

Under the Federal statutes the preparation of the jury list is a non-delegable duty of the Clerk (or his deputy) and the Jury Commissioner. This duty calls for the exercise of judgment. They necessarily have committed to them a discretion in making selection of names from which to draw. In Glasser v. United States, 315 U.S. 60, 85; 86 L. Ed. 680, 707, the Court said:

> "Jurors in a federal court are to have the qualifications of those in the highest court in the state, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code, Secs. 275, 276, 28 U.S.C.A., Secs. 411, 412. This duty of selection may not be delegated."

All that is called for on their part is an honest and unbiased effort to obtain a jury list from which no class has been purposefully and systematically excluded because of class prejudice.

In the instant case the Clerk and Jury Commissioner discharged their statutory functions impartially, according to law and in the exercise of a sound discretion.

(5) The contention that the "decision of the Supreme Court had not been complied with" is entirely without merit. The testimony of the Clerk and Jury Commissioner is clear and convincing that the jurors were impartially selected and drawn and represented a cross-section of the community. Further, that there was no systematic or intentional exclusion of any group, particularly those engaged in working for a daily wage. *Thiel v. Southern Pacific Co.*, 66 S. Ct. 984, 986.

(6) The asserted ground that a "majority of the persons selected were prejudiced in favor of the defendant Company" is equally without merit. There is no evidence that the persons whose names were selected and placed in the box by the Clerk and Jury Commissioner, were biased or otherwise prejudiced.

Counsel for the movant cannot supply evidence by the mere assertion of reckless charges and unfounded supposition. The burden of proof rests upon him and must be supported by competent evidence. It is the settled rule that all necessary prerequisites to the validity of official action are presumed to be complied with and where the contrary is asserted it must be affirmatively shown. *Lewis v. United States,* 279 U.S. 63, 73 L. Ed. 615, 619.

(7) There is no evidence before this Court that the Jury Commissioner and Clerk sought "jurors of the highest or

superior intelligence and not those of 'ordinary intelligence'."

It appears that these officials acted honestly, impartially and without bias in processing and selecting the names which eventuated in the jury list; in so doing they were guided by the statutes, Federal and State, as applicable, under the direction of the District Court.

Jury lists are not conceived out of thin air. The non-delegable duty of preparing them rests with the Clerk and Commissioner. The evidence adduced at the hearing before this Court points unerringly to a painstaking effort on their part to discharge their official obligation.

An allegation of discriminatory practice in selecting a jury panel challenges an essential element of proper judicial procedure—the requirement of *fairness* on the part of the judicial arm of the Government. It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice. *Akins v. Texas,* 325 U.S. 398; 65 S. Ct. Rep. 1276, 1278, 1279.

(8) Specification or ground 8 is answered by reference to the statutes alluded to. Congress has outlined a specific procedure which was carried out in the selection and drawing of the jury panel under attack.

For the foregoing reasons, it is hereby Ordered that: Plaintiff's motion to strike and quash the entire jury panel for the July, 1946 Term; for an order directing the Clerk and Jury Commissioner to select a new panel; for an order directing the parts of the District from which jurors shall be returned, be, and the same is hereby denied.

Dated: August 28, 1946.

George B. Harris
United States District Judge.

APPENDIX D

JURY EMPANELMENT

We outline here the information obtained about the 37 talesmen called when the jury was empanelled.

Twelve jurors and an alternate were empanelled. Of the 12 8 were men and 4 were women. The alternate was a woman. During the trial two of the 12 became sick and were excused. They were

Albert N. Wilmes (273, 319, 725, 726), sign painter operating his own business.

Zola Taylor (343, 725, 726), bookkeeper, American Trust Co.

The 4 women who served throughout and were among the 11 who returned the verdict were:

Mrs. Mary A. Stewart (273, 280, 281), occupation not disclosed.

Miss Bessie P. Walthall (273, 317), occupation not disclosed.

Mrs. Julie Mescovich (358), wife of a restaurant keeper.

Mrs. Lei Troupe (365), occupation not disclosed.

The seven men who served through and were among the 11 who returned the verdict were:

Elmo J. Martinez (273, 335), shipping clerk, American Chicle Co.

D. P. Surber (314, 342), U. S. Army retired.

Carl A. Rick (315), in mortgage loan department of Prudential Insurance Co. (317), otherwise nature of employment not disclosed.

Joseph De Martini (324, 325), wholesale tobacco, partnership with his brother.

Frans Schmitt (337, 339), retired leathergoods manufacturer.

Warren J. Tyson, Jr. (348), clerk, Signal Oil Co.

Louis A. Pastroni (352), teller, Bank of America.

A total of 11 (not 10), women were examined. They were in addition to the 5 selected (see above):

Florence M. Douglas (273, 286-289), sales manager and buyer for a rice business which shipped by S. P.; cousin worked for S. P. at Elko; knew a man in the S. P.; excused by the court at plaintiff's suggestion.

Mrs. A. McCullon (289, 290), secretary to an S. P. Co. executive. Excused.

Mrs. Eleanor Van Praag (314), occupation not disclosed. Said she was prejudiced against defendant. Excused.

Nell A. Biggins (314, 329), with Sunset Feather Co., biased in favor of plaintiff. Excused.

Miss Dianna M. Domeconi (346, 347), occupation not disclosed and excused because biased in favor of plaintiff.

Mrs. Helen G. Star (350-352), occupation not disclosed, excused because biased against user of liquor.

In addition to the 3 women excused because they were biased in favor of plaintiff or against defendant **Emil Pahlka** (348), a real estate broker, was excused because biased against railroads.

Of the 37 examined there is not sufficient information to say what the occupation or business of 9 was. In addition to those noticed were **Harvey P. Clark** (273, 280, 305, 306), **Harry R. Land, Jr.** (273, 314,—with McKenzie and Co. but the nature of their business and his connection with it did not appear), **Gilbert L. Van Wormer** (300, 302). This makes a total of 9 about whom there is not enough known to make any statement as to economic or social position.

There were 10 of the 37 who are properly to be placed in the laboring or wage earning class: **Martinez,** a shipping clerk; **Mrs. McCullon,** a secretary or stenographer; **Thomas G. Stevenson, Jr.** (306, 307-313), having an undisclosed connection with a grain merchant and exporter; **Nell A. Biggins** with the Sunset Feather Co.; **Ricks,** apparently in a clerical position with a loan department of an insurance company; **Zola Taylor,** a bookkeeper; **George R. Dagnall** (329, 336, 337), working at the moment organizing the Marin County Community Chest Drive; **Tyson,** a clerk with the Signal Oil Co.; **Pasgroni,** the teller at the Bank of America; **James Di Maisimo** (361-363), a carpenter working for a macaroni factory, peremptorily challenged by the plaintiff.

Four were retired: **Surber,** from the Army, position not disclosed; **Andrew Verino** (273, 282, 298, 299, 346), apparently formerly in some phase of the insurance business; **Schmitt,** the retired leather manufacturer; **Clarence W. Dobie** (297), retired from an undisclosed connection with Crocker First National Bank.

Five jurors held semi-executive positions: **Mrs. Douglas,** sales manager and buyer for a rice concern; **Edgar R.**

Trethway (273, 279, 281, 294), credit manager for Earl C. Anthony, Inc., an automobile sales concern; **Homer F. Rosetti** (273, 280, 330, 343), a branch manager of Pacific Finance Corp.; **Allen J. Uren** (302), sales manager Gypsum Division, Pacific Portland Cement Co.; **Edwin G. Asplin** (353, 358), purchasing agent and traffic manager for Langendorf Bakeries.

Two were probably fairly important business men. **Thomas R. Edwards** (273, 333), was in the candle supply business and chairman of the board of his concern. The size of the business does not appear. **James A. Cambridge** (290) was auditor of Anglo California National Bank.

Seven were in the class of proprietors of business, the business apparently being small: **Wilmes** was the sign painter; **Leslie H. Carter** (273, 321), described himself as a dramatic book publisher; **Seamen J. Molkenbuhr** (323), was apparently the proprietor, or one of the proprietors, though he may have been only a salesman, of a jewelry concern; **De Martini** and his brother were partners in the wholesale tobacco business; **Emil Pahlka** was a real estate broker; **Mrs. Mescovich** was the wife of a restaurant keeper; **George S. Minot** (364), was an independent advertising counsellor.

Fifteen of the 37 had some connection, close or remote, with S. P. Co. or someone connected with it. **Mrs. McCullon** was employed by S. P. Co. as a secretary. **Rossetti** was the brother of a director. **Clark** knew an S. P. Co. director and possibly owned some stock,—he did not know. **Dobie** owned S. P. Co. stock. **Verino** for a short time, about 1900, had a boiler job with S. P. Co. **Trethway**, 22 or 23 years ago, worked for S. P. Co. for a short time

as an investigator; he had a cousin with S. P. Co. and some friends working for it. Several had no connection except that the concerns with which they were connected were shippers, as over the lines of other railroads: **Mrs. Douglas, Van Wormer, Uren** (who also knew an S. P. Co. director), **Stevenson** (whose brother's father-in-law worked for S. P. Co.) and **Asplin.** As was natural, they knew people connected with S. P. Co. **Cambridge** was with a bank which did some banking for S. P. Co. **Molkenbuhr** sold jewelry to an S. P. Co. employees club (not S. P. Co.). **Minot** knew a Mr. Turner.

Appendix E

LEGAL RELATION BETWEEN DULY COMMISSIONED RAILROAD POLICE AND RAILROAD

Nevada Compiled Laws, Section 6327: Act Approved March 22, 1941, provides:

> "The Governor of this State is hereby authorized and empowered, upon the application of any railroad company, to appoint and to commission to serve during his pleasure one or more persons having the residential qualifications of an elector, designated by such company, and to serve at the sole expense of such company, as policeman or policemen, with the powers of peace officers, and who, after being duly sworn, may act as such policeman or policemen upon the premises or property owned or operated by such company. * * *"

Under a similar statute it has been held that a railroad is not liable for malicious arrest by a railroad policeman.

> "Respondeat superior has no application where there is no evidence tending to show that the company was instrumental in causing the arrest or subsequent prosecution."
>
> *Redgate v. S. P. Co.,* 24 C.A.2d 573, 581, 75 P.2d 658.

In *Maggi v. Pompa,* 105 C.A. 496, 289 P. 982 (hr. den.), where a bystander was shot by a special police officer, the Court approved an instruction that *prima facie* private employers are not liable for the acts of public officers, and that a special policeman comes within this rule. It

was held that there was a presumption that the special policeman's act was done in the performance of official duty. The payment of wages is insufficient to constitute a basis for liability.

Accord:

St. John v. Reid, 17 C.A.2d 5, 61 P.2d 363 (hr. den.);

Squires v. S. P. Co., 42 C.A. 459, 183 P. 695;

Goldberg v. R. Co., 97 N.J.L. 374, 117 Atl. 479;

Pounds v. R. Co., 142 Ga. 486, 83 S.E. 96;

R. Co. v. Kelly, 177 F. 189 (C.C.A. 2);

Red River Lumber Co. v. Cardenas, 95 F.2d 157 (C.C.A. 9).

This last case recognized and applied the presumption noticed in the *Maggi Case* above, and was followed in *N. L. R. B. v. Red River L. Co.,* 109 F.2d 159, 160 (C.C.A. 9).

Following the above cases see *MacDonald v. Ogan,* 64 Idaho 173, 129 P.2d 654.